Supreme Court, U. S.
FILED
DEC 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

## No. 75-44

ROBERT BURRELL, *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, ETC., *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, ET AL., *Petitioners,*
v.
JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW AND
DR. DOMINGO C. SORONGON, *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF OF PETITIONERS

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General,
CLARENCE W. SHARP,
Assistant Attorney General,
Chief, Criminal Division,
DONALD R. STUTMAN,
Assistant Attorney General,
One South Calvert Building,
Baltimore, Maryland 21202
For Petitioners.

The Daily Record Co., Baltimore, Md. 21202

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 2 |
| QUESTIONS PRESENTED FOR REVIEW | 9 |
| STATEMENT OF THE CASE | 9 |
| A. McCray v. Burrell | 11 |
| B. McCray v. Smith | 15 |
| SUMMARY OF ARGUMENT | 18 |
| ARGUMENT: | |
| I. Exhaustion of adequate and effective state administrative remedies is required in an action brought by a state prisoner pursuant to 42 U.S.C. § 1983 . | 23 |
| A. The facts disclose that the Inmate Grievance Commission of Maryland represents an adequate and effective state administrative remedy for state prisoners' civil rights complaints | 23 |
| B. Prior decisions of this Court do not foreclose the requirement that a state prisoner must exhaust Maryland's administrative remedies before bringing an action pursuant to 42 U.S.C. § 1983 | 43 |

PAGE

II. Exceptions recognized by federal courts to the principle that exhaustion of state administrative remedies is not required in an action pursuant to § 1983 indicate that a similar exception should apply in this case ..... 60

A. Prospective Injury ..... 61

B. Other Exceptions ..... 66

III. Sound and overriding policy reasons require exhaustion of Maryland's effective and adequate state administrative remedies pursuant to § 1983 under the circumstances of this case ..... 69

A. The abuse of 42 U.S.C. § 1983 establishes the need for exhaustion of Maryland's remedy ..... 75

B. Benefits to be gained from exhaustion ..... 77

C. Alternative proposed approaches .. 79

D. 81

IV. The United States Court of Appeals for the Fourth Circuit erred when it reversed the judgments of the United States District Court for the District of Maryland in McCray v. Burrell, No. 74-1042, and McCray v. Smith, No. 74-1043, based on a finding that Respondent McCray's Eighth and Fourteenth Amendment rights were violated under the circumstances of those cases and remanded the same for determination on the merits ..... 91

CONCLUSION ..... 100



## TABLE OF CITATIONS

### *Cases*

PAGE

Acanfora v. Board of Education, 491 F.2d 498 (4th Cir. 1974) ..... 62

Agee v. Hickman, 490 F.2d 210 (8th Cir. 1974) 92

Almond v. Kent, 459 F.2d 200 (4th Cir. 1972) ... 95

Armsden v. Cataldo, 315 F. Supp. 129 (D. Mass. 1970) ..... 38, 59

Askew v. Hargrave, 401 U.S. 476 (1971) ..... 49

B's Co., Inc. v. B. P. Barber & Associates, Inc., 391 F.2d 130 (4th Cir. 1968) ..... 92, 93

Barker v. Hardway, 399 F.2d 638 (4th Cir. 1968) 62

Borrer v. White, 377 F. Supp. 181 (W.D. Va. 1974) 90

Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973) ..... 66

Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971) 24

Carter v. Stanton, 405 U.S. 669 (1972) .....19, 56, 58, 64

Clark v. Zimmerman, 394 F. Supp. 1166 (M.D. Pa. 1975) ..... 90

Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971) ..... 24

Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944) 24

Cordova v. Reed, No. 1063, September Term, 1974 (2d Cir., Aug. 7, 1975) ..... 91

Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959) ..... 43

Cravatt v. Thomas, 399 F. Supp. 956 (W.D. Wisc. 1975) ..... 69

Damico v. California, 389 U.S. 416 (1967) ..... 19, 51, 56, 64, 81

PAGE

District of Columbia v. Carter, 409 U.S. 418 (1973) ..... 44
Dove v. Parham, 282 F.2d 256 (8th Cir. 1960) .. 43
Egner v. Texas City Ind. School Dist., 338 F. Supp. 931 (S.D. Tex. 1972) ..... 48, 58
Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969) . 91
Farrington v. North Carolina, 391 F. Supp. 714 (D. N.C. 1975) ..... 90
Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975) 96
Fuentes v. Roher, 519 F.2d 379 (2d Cir. 1975) .. 90
Garner v. Raulston, 390 F.2d 644 (6th Cir. 1968) 31
Gibson v. Berryhill, 411 U.S. 564 (1973) .....64, 66, 69
Goldberg v. Kelly, 397 U.S. 254 (1970) ..... 46
Gonzales Salcedo v. Lauer, 430 F.2d 1282 (9th Cir. 1970) ..... 67
Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975) 90
Hawk, Ex parte, 321 U.S. 114 (1944) ..... 69
Hayes v. Cape Henlopen School Dist., 341 F. Supp. 823 (D. Del. 1972) ..... 38, 58
Hayes v. Secretary, 455 F.2d 798 (4th Cir. 1972) 26, 70
Hellman v. Colonial Insurance Co., 475 F.2d 1061 (9th Cir. 1973) ..... 93
Hemsley v. Myers, 45 F. 283 (D. Kan. 1891) ..... 43
Horton v. Orange, 464 F.2d 536 (4th Cir. 1972) 62
Houghton v. Shafer, 392 U.S. 639 (1968) .....19, 54, 56
Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966) 95, 98
Huffman v. Pursue, ___ U.S. ___, 95 S. Ct. 1200 (1975) ..... 83
Hyde v. Fitzberger, 365 F. Supp. 1021 (D. Md. 1973) ..... 42, 90



PAGE

Jones v. Superintendent, 370 F. Supp. 488 (W.D. Va. 1974) ..... 90
Karpinski v. Resor, 419 F.2d 531 (3d Cir. 1969) 67
King v. Smith, 392 U.S. 309 (1968) .....19, 54, 56
Kochie v. Norton, 343 F. Supp. 956 (D. Conn. 1972) .....51, 53, 54, 57, 67
Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966) 24, 97
Landman v. Royster, 354 F. Supp. 1302 (E.D. Va. 1973) ..... 95, 98
Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971) ..... 24, 98
McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964) ..... 24
McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) *passim*
McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973) .....*passim*
McCray v. Smith, 367 F. Supp. 1191 (D. Md. 1973) .....*passim*
McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973) 67
McNeese v. Board of Education, 373 U.S. 668 (1963) .....19, 50, 52, 56, 66
Marino v. Ragen, 332 U.S. 561 (1947) ..... 55
Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971) 64
Mondell v. Mayor & City Council, 356 F. Supp. 76 (D. Md. 1973) ..... 62, 79
Monroe v. Pape, 365 U.S. 167 (1961) .....19, 22, 43, 48, 54, 56, 67, 82, 90
Morris v. Travisono, 310 F. Supp. 857 (D. R.I. 1970) ..... 24
Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970) .. 24
Parisi v. Davidson, 405 U.S. 34 (1972) ..... 77
Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971) 31

PAGE

Plano v. Baker, 504 F.2d 595 (2d Cir. 1974) ..... 91
Pope v. State Bar of Texas, 480 F.2d 998 (5th Cir. 1973) ..... 62
Preiser v. Rodriguez, 411 U.S. 475 (1973)..20, 24, 58, 66, 67, 70, 83, 87
Procunier v. Martinez, ___ U.S. ___, 94 S. Ct. 1800 (1974) ..... 77
Quaker Action Group v. Morton, 460 F.2d 854 (D.C. Cir. 1971) ..... 80
Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973) ..... 63
Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972) 58
Rodriguez v. McGinnis, 451 F.2d 730 (2d Cir. 1971) ..... 96
Royall, Ex parte, 117 U.S. 241 (1886) ..... 69
Sohm v. Fowler, 365 F.2d 915 (D.C. Cir. 1966) . 67
Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) 24, 99
State v. McCray, 267 Md. 111 (1972) ..... 23, 26
Stevenson v. Board of Education, 426 F.2d 1154 (5th Cir. 1970) ..... 63
Stokes v. McClellan, Civil No. 73-1182-B (D. Md., Apr. 1, 1974) ..... 42
Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972) . 61
United Automobile, Aerospace, & Agr. Wkrs. of Am. v. State Farm Insurance Co., 350 F. Supp. 522 (N.D. Ill. 1972) ..... 63
United States, ex rel. Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969) ..... 67
United States, ex rel. Taylor v. Fritz, 446 F.2d 36 (8th Cir. 1971) ..... 67
Washington v. Boslow, 375 F. Supp. 1298 (D. Md. 1974) ..... 33, 36, 39, 40, 42, 71, 85, 87
Weems v. United States, 217 U.S. 349 (1910) .... 95



PAGE

Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969) ... 61
Wilwording v. Swenson, 404 U.S. 249 (1971) 19, 55, 56, 58, 72
Wolff v. McDonnell, 418 U.S. 539 (1974) ..... 75, 83
Wright v. McMann, 460 F.2d 126 (2d Cir. 1972) 98
Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) 98
Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970) ..... 24
Wright v. Maryland Penitentiary, 429 F.2d 1101 (4th Cir. 1970) ..... 70
Younger v. Harris, 401 U.S. 37 (1971) ..... 83

***Constitutions***

United States Constitution:
Eighth Amendment .....91, 93, 95, 98
Fourteenth Amendment ..... 91

***Statutes and Rules***

Federal Rules of Civil Procedure:
Rule 52 ..... 92
Maryland Annotated Code:
Article 41, Sec. 204F .....*passim*
United States Code:
5 U.S.C. § 701, et seq ..... 81
28 U.S.C. § 1343 ..... 24
28 U.S.C. § 1915 ..... 31
28 U.S.C. § 2254 .....18, 24, 55
28 U.S.C. § 2255 ..... 69
42 U.S.C. § 1983 .....*passim*

***Miscellaneous***

PAGE

Aldisert, Ruggero J., *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Case Load,* Law and Social Order 557 (1973) ..... 80

1975 Annual Report of the Director, Administrative Office of the United States Courts ..... 25

1973 Annual Report of Director, Administrative Director of the United States Courts ..... 34

Burger, Warren E., Address to the National Association of Attorneys General, at Washington, D.C., February 6, 1970 ..... 26

Burger, Warren E., *Report on the Federal Judicial Branch—1973,* 59 A.B.A.J. 1125 .... 27, 81

68 Colum. L. Rev. 1201 (1968), *Exhaustion Of State Remedies Under The Civil Rights Act* .....43, 53, 81

Davis, Bryan R., *State Prisoners' Suits: Proper Forum, Choice Of Remedy, And Effect Of Judgment,* 51 Texas L. Rev. 1364 (1973) ..... 43, 60

Davis, K., *Administrative Law Treatise* (Supp. 1970) ..... 82, 84

Friendly, H., *Federal Jurisdiction: A General View,* 105-07 (1973) ..... 85

Hart, H., and Wechsler, H., *The Federal Courts and The Federal System* (2d Ed. 1973) ..... 70

82 Harv. L. Rev. 1486 (1969), *Limiting the § 1983 Action In The Wake of Monroe v. Pape*...38, 43, 44, 47, 51, 54, 79, 82

2 Hofstra L. Rev. 345 (1974) ..... 27, 60

57 Judicature 314 (March 1973), *Prison Ombudsmen Provide a Safety Valve* ..... 85, 89



PAGE

McCormack, Wayne, *The Expansion of Federal Question Jurisdiction And The Prisoner Complaint Caseload,* Wisc. L. Rev. 523 (1975) 25, 49, 54, 66, 70, 80

National Association of Attorneys General, Committee on the Office of the Attorney General, *Correctional Services Newsletter,* Vol. 4, No. 9 (November 26, 1975) ..... 37, 42

59 Opinions of the Attorney General of Maryland 438 (1974) ..... 28, 35

Pfeifer, Kristin, *Exhaustion of State Administrative Remedies Under The Civil Rights Act,* 8 Ind. L. Rev. 565 (1975) .....*passim*

*Report Of The Study Group On The Caseload Of The Supreme Court,* 57 F.R.D. 573 (1972) 37, 80, 85

Resource Center on Correctional Law and Legal Services, A.B.A. Commission on Correction Facilities Services, Maryland Inmate Grievance Commission, (*Ombudsman/Grievance Mechanism Profiles—No. 3 (1974))* .....29, 76, 90

5 Rutgers-Camden L.J. 307 (1974) ..... 27

Sullivan, Barry, *Exhaustion Of State Administrative Remedies In § 1983 Cases,* 41 Univ. of Chi. L. Rev. 537 (1974) .....43, 45, 48, 60, 66 77, 80, 83, 87, 90

Wilkes, *The New Federalism in Criminal Procedure — State Court Evasion of the Burger Court,* 62 Ky. L.J. 421 (1974) ..... 70

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

## No. 75-44

ROBERT BURRELL, *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, ETC., *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, ET AL., *Petitioners,*
v.
JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW AND
DR. DOMINGO C. SORONGON, *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF OF PETITIONERS

## OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit in *McCray v. Burrell,* 516 F.2d 357 (4th Cir. 1975) appears in the Appendix to the Petition for Writ of Certiorari at pp.

72a-107a. The Opinion and Judgment of the United States District Court for the District of Maryland in *McCray v. Burrell* and *McCray v. Smith*, 367 F. Supp. 1191 (D. Md. 1973) appears in the Appendix to the Petition for Writ of Certiorari at pp. 1a-58a. The Opinion and Judgment of the United States District Court for the District of Maryland in *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974), appears in the Appendix to the Petition for Writ of Certiorari at pp. 58a-69a. The unreported Opinion of the United States District Court for the District of Maryland in *Stokes v. McClellan*, Civil No. 73-1182-B, (D. Md. Memorandum and Order, April 1, 1974) appears in the Appendix to the Petition for Writ of Certiorari at pp. 69a-71a.

## JURISDICTION

This Court has jurisdiction to review this cause by Certiorari pursuant to 28 U.S.C. § 1254 (1), and has accepted it for such purpose by granting said Writ on November 3, 1975.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### 42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.



### Article 41, Annotated Code Of Maryland

*(Ch. 210, Laws of Maryland, 1971)*

### § 204F. Inmate Grievance Commission.

(a) *Commission established; appointment and terms of members; chairman; vacancies; compensation and expenses.* — The Inmate Grievance Commission is established as a separate agency within the Department of Public Safety and Correctional Services. It shall consist of five members appointed by the Governor with the advice of the Secretary of Public Safety and Correctional Services. Of the five members so appointed, not less than two shall be lawyers qualified to practice law in the State of Maryland and not less than two members shall be persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services. Of the members initially appointed, twc shall be for a term of four years, one shall be for a term of three years, one shall be for a term of two years and one shall be for a term of one year. Thereafter, all reappointments shall be for terms of four years. The Governor, with the advice of the Secretary of Public Safety and Correctional Services shall designate the chairman from time to time. The Governor, with the advice of the Secretary of Public Safety and Correctional Services, shall fill any vacancy which occurs before the expiration of a term for the balance of the term so remaining. Each member of the Commission shall receive per diem compensation as provided in the budget for each day actually engaged in the discharge of his official duties as well as reimbursement for all necessary and proper expenses, in accordance with the standard travel regulations.

(b) *Appointment and salary of executive director; investigative, secretarial and clerical employees.* — The Secretary of Public Safety and Correctional Services, with the advice of the Commission, and with the approval of the Governor, shall appoint an executive director of the Commission who shall serve at the pleasure of the Secretary and who shall receive such salary as provided in the budget. In addition, the Secretary may provide the Commission with such investigative, secretarial and clerical employees as may be necessary for the efficient administration of the powers and duties of the Commission and as provided in the budget.

(c) *Removal of members.* — The Governor, upon the recommendation of the majority of the Commission or upon the recommendation of the Secretary, may remove any member of the Commission for one or more of the following:

(1) Conviction of a crime involving moral turpitude or of any criminal offense the effect of which is to prevent or interfere with the performance of Commission duties.

(2) Failure to regularly attend meetings of the Commission.

(3) Failure to carry out duties assigned by the Commission or its chairman.

(4) Acceptance of another office or the conduct of other business conflicting with or tending to conflict with the performance of Commission duties.

(5) Any other ground which, under law, necessitates or justifies the removal of a State employee.

(d) *Submission of grievance or complaint.* — Any person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission within such time and in such manner as prescribed by regulations promulgated by the Commission. If, and to the extent that, the Division of Correction or the Patuxent Institution has a grievance or complaint procedure applicable to an inmate's particular grievance or complaint, and if the Inmate Grievance Commission deems such procedure reasonable and fair, the Commission may by regulations require that such procedure be exhausted prior to the submission of the grievance or complaint to the Commission.



(e) *Preliminary review.* — When a grievance or complaint is submitted to the Inmate Grievance Committee, the Commission, or any member thereof or the executive director, if so provided by the Commission's regulations, shall preliminarily review the grievance or complaint. If upon such preliminary review the grievance or complaint is determined to be on its face wholly lacking in merit, it may be dismissed, by the reviewing commissioners or commissioner or executive director as the case may be, without a hearing or without specific findings of fact. Such order of dismissal shall be forwarded to the complainant within 60 days after submission of the grievance or complaint and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(f) *Hearing and disposition by Commission; review by Secretary of Public Safety and Correctional Services.* — Whenever, after the preliminary review provided for in subsection (e), a grievance or complaint is not found to be on its face wholly lacking in merit, the Commission shall as promptly as practicable hold a hearing on the grievance or complaint. At least three members of the Commission shall sit at any hearing, and decisions shall be by a majority of those sitting. A record of the testimony presented at the hearing shall be kept according to the rules and regulations promulgated by the Commission. The Commission's decision shall be issued promptly after the hearing in the form of an order which shall include a statement of the findings of fact, the Commission's conclusions and its disposition of the complaint. The types of disposition shall be as follows:

(1) If after the hearing, the Commission finds in its order that the complaint is wholly lacking in merit and should be dismissed, such an order of dismissal shall be promptly forwarded to the complainant and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(2) However, if after the hearing, the Commission in its order finds that the inmate's complaint was in whole or in part meritorious, such order shall be promptly forwarded to the Secretary of Public Safety and Correctional Services. Within fifteen days of the receipt of such an order, the Secretary by order shall affirm the order of the Commission, or shall reverse or modify the order where he disagrees with the findings and conclusions of the Commission. The Secretary shall order that the appropriate official of the institution in question accept in whole or in part the recommendation



of the Commission or the Secretary may take whatever action he deems appropriate in light of the Commission's findings. The order of the Secretary shall be promptly forwarded to the complainant, and the Secretary's order shall constitute the final decision for purposes of judicial review.

(g) *Access to documentary evidence; subpoenas; oaths and affirmations.* — The Commission, with the approval of the Secretary of Public Safety and Correctional Services, shall at all reasonable times have access to, for the purposes of examination, and the right to copy, any documentary evidence of any person or institution being investigated or proceeded against and may require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person relating to any matter under investigation. The presiding commissioner at a hearing may administer oaths and affirmations.

(h) *Right of inmate to appear before Commission; opportunity to call witnesses; representation by counsel.* — The inmate shall have the right to appear before the Commission and shall have the opportunity to call a witness or a reasonable number of witnesses depending upon the circumstances and the nature of the complaint, subject to the discretion of the Commission as to the relevancy of the testimony and questions and the number of witnesses sought to be called. The inmate shall have a reasonable opportunity to question any witnesses who testify before the Commission. Such rights of the inmate shall not be unreasonably withheld or restricted by the Commission. If the inmate requests that he be represented at the hearing by an attorney of his own choosing he shall be permitted such representation at his own expense.

(i) *Record of complaints.* — A record shall be kept of all complaints and their disposition which shall be open to public inspection during regular business hours.

(j) *Conduct of hearings at certain institutions.* — For the performance of its duties, the Commission may conduct hearings at the institutions under the supervision and control of the Division of Correction or at the Patuxent Institution.

(k) *Rules and regulations.* — The Commission, subject to the approval of the Secretary, shall have the power to adopt rules and regulations for the conduct of its proceeding as provided for in this section.

(l) *Judicial review.* — No court shall be required to entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies as provided in this section. Upon the final decision of the Secretary of Public Safety and Correctional Services, the complainant shall be entitled to judicial review thereof. Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, in which is located the institution where the complainant is confined. Review by the court shall be limited to a review of the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings. The court's review shall be limited to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements.



## QUESTIONS PRESENTED FOR REVIEW

I. Is exhaustion of adequate and effective state administrative remedies required in an action brought by a state prisoner pursuant to 42 U.S.C. § 1983?

II. Do the exceptions recognized by federal courts to the principle that exhaustion of state administrative remedies is not required in an action pursuant to § 1983 indicate that a similar exception should apply in this case?

III. Do sound and overriding policy reasons require exhaustion of Maryland's effective and adequate state administrative remedies pursuant to § 1983?

## STATEMENT OF THE CASE

The complaints in these cases invoked the jurisdiction of the United States District Court for the District of Maryland pursuant to 28 U.S.C. § 1343(3) and (4), 42 U.S.C. § 1983 and the Constitution of the United States.

Respondent McCray sought relief pursuant to 42 U.S.C. § 1983 for alleged deprivations of liberty without due process of law and for alleged imposition of cruel and unusual punishment arising out of two separate incidents in which he was allegedly placed naked in an isolation cell for 48 hours as a result of disruptive and emotionally unstable behavior on his part. The United States District Court for the District of Maryland in *McCray v. Burrell,* 367 F. Supp. 1191 (D. Md. 1973), found no constitutional violations on the part of Petitioners Burrell and Smith and further found that they had acted in accordance with standard operating procedures which were not violative of Respondent's civil rights. The United States District Court further found that Respondent was required to exhaust his

State administrative remedies provided in Article 41, Section 204F, Annotated Code of Maryland.

Respondent Stokes filed a pro se complaint pursuant to 42 U.S.C. § 1983 alleging that prison officials had violated his First and Fourteenth Amendment rights by denying him access to political newspapers. The United States District Court, on the Motion of Petitioner McClellan herein, dismissed the case for failure to exhaust State administrative remedies as outlined above.

Respondent Washington filed a pro se complaint pursuant to 42 U.S.C. § 1983 alleging injuries and violations of his constitutional rights as a result of the failure of a prison doctor to provide him with necessary medical care. The United States District Court summarily dismissed the complaint for failure to exhaust State administrative remedies which the District Court found would have provided fair and adequate redress for the Respondent.

*McCray v. Burrell, McCray v. Smith* and *Stokes v. McClellan* were consolidated for purposes of appeal and the same were heard before a three-judge panel of the United States Court of Appeals for the Fourth Circuit on June 6, 1974. Following argument, the United States Court of Appeals for the Fourth Circuit, by Order dated June 27, 1974, consolidated *Washington v. Boslow* with the above three cases and the same were heard *en banc* before the United States Court of Appeals for the Fourth Circuit on October 1, 1974.

On April 10, 1975, the United States Court of Appeals for the Fourth Circuit held that exhaustion of State administrative remedies was not required prior to invoking Federal jurisdiction, reversed all of the judgments below and remanded the cases of Respondents Stokes and Washington for a determination on the merits. The cases of Respondent McCray were remanded for further proceedings in accordance with their finding that Respondent McCray was denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution.



Judge Field filed a separate opinion in which he concurred and dissented and in which Judge Russell joined. Judge Widener also filed a separate opinion in which he concurred and dissented and in which Judge Russell joined.

A Petition for the issuance of the Writ of Certiorari was timely filed and by Order of November 3, 1975, this Court granted the Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in these cases.

### *Facts*

The following statement of facts in *McCray v. Burrell* and *McCray v. Smith* is presented in a case-by-case manner. Every effort has been made to distinguish between facts found by the District Court and facts recited by the District Court which appear from the testimony.

#### A. McCray v. Burrell

Respondent McCray, a prisoner at the Maryland Penitentiary in Baltimore, Maryland, was placed in cell number 325 of the South Wing on December 31, 1971 by Officer Fozzio between 6:00 P.M. and 7:00 P.M. Apparently, the cell had not been cleaned since the departure of the last occupant as there was paper, blankets, a metal locker and other trash lying on the floor. Respondent McCray requested that the cell be

cleaned up, but was informed that it was too late in the evening. Respondent McCray then swept the trash in front of his cell door ostensibly to be pushed out into the tier the following day. *McCray v. Burrell* 367 F. Supp. 1191, 1212 (D. Md. 1975) (App. 39a).[1]

At approximately 9:00 A.M. on January 1, 1972, Respondent, who testified that he does not usually smoke, borrowed a cigarette and a light from the inmate in the adjacent cell. He testified further to dozing off with the lit cigarette in his hand and awakening to find the cell was filled with smoke. *McCray, supra,* at p. 1212 (App. 39a). He stated that he attempted to stamp out the fire, then to smother the blaze with the mattress. *McCray, supra,* at p. 1212 (App. 40a). He took a bucket and tried to carry water from the sink to douse the fire, but the bucket would not properly fit under the sink, so he used a metal cabinet to first break the sink and then the toilet, to allow the water to flow more freely. When these attempts failed, he covered his head and body with water. He stated that he did not set the fire intentionally, but was charged with that offense in an institutional disciplinary proceeding. *McCray, supra,* at p. 1212 (App. 40a).

The correctional officers, in the meantime, attempted to put out the fire with a malfunctioning fire extinguisher. After a short period of time, they procured a second extinguisher and managed to put out the fire.

---

[1] The designations marked "App." ___ are to the Appendix contained in Petitioners' Petition for Writ of Certiorari previously filed in this case. The designation "A." refers to the Appendix filed with this Brief.

*McCray v. Burrell,* 367 F. Supp. 1191 (D. Md. 1973), will be referred to hereinafter as *McCray, supra,* at p. ___ *McCray v. Burrell,* 516 F.2d 357 (4th Cir. 1975), will be referred to hereinafter as *McCray, supra,* 516 F.2d at p. ___



Respondent testified that he suffered burns to his hands and face, but the testimony of the nurse on duty at the time of the fire, Mrs. Weber, and the dispensary records, revealed that there were no blisters or serious burns evident. *McCray, supra,* at pp. 1212-1213 (App. 40a). Mrs. Weber, stated that when Respondent was brought into the infirmary, he was arrogant and literally refused to allow Officer Martin to apply cold compresses to the areas that he complained had been burned. *McCray, supra,* at p. 1213 (App. 40a). The Officer, however, was finally able to apply the compresses and bacitracin ointment to his burns. Mrs. Weber, according to the testimony of Respondent, then recommended that he be placed in a locked cell. *McCray, supra,* at p. 1213 (App. 40a). Captain Burrell, a correctional officer and duty captain whose responsibility was the operation and administration of the Penitentiary on the 8:00 A.M. to 4:00 P.M. shift, ordered that Respondent be placed in the Mental Observation area (M.O.). Captain Burrell testified that he issued this order acting upon information that Respondent had intentionally set the fire, and, as this was not a rational act, he believed Respondent McCray to be mentally unstable. *McCray, supra,* at p. 1213 (App. 40a). The District Court found that Captain Burrell made a reasonable determination under the circumstances. Having done this, Captain Burrell, for Respondent's own safety, as well as the safety of the other inmates, decided to place Respondent McCray in M.O. without clothes or a mattress. He testified that this was normal procedure whenever he had reason to believe that an inmate might try to injure himself. *McCray, supra,* at p. 1213 (App. 41a).

Respondent remained in the M.O. area for approximately 48 hours, from January 1-3, 1972. While the

District Court found that apparently Respondent McCray was not visited by a medical doctor, nurse, or a psychologist during this interval, the District Court also found that shortly after Respondent was treated in the dispensary, Nurse Weber contacted Dr. Holljes, advising him that the patient had been placed in M.O., and attempted unsuccessfully to contact a Dr. Stewart. The records introduced indicated that Respondent was next seen by a physician, Dr. Wood, on January 4, 1972. *McCray, supra,* at p. 1213 (App. 41a).

On January 13, Respondent was examined by Dr. Gould who testified that he noticed several crusted sores on Respondent's cheeks, ears, a small amount on his back (which the Respondent did not remember until questioned on cross examination), and some sores on his knuckles. *McCray, supra,* at p. 1213 (App. 41a). Dr. Gould further testified that the application of cold compresses and an antibiotic ointment, similar to the type applied to Respondent by Officer Martin, was the appropriate treatment. While he stated that this treatment should have been continued for a period of time, he could not say that it was inadequate. *McCray, supra,* at p. 1213 (App. 41a).

Although there was no testimony given to explain why a psychologist did not examine Respondent during his confinement in the M.O. area, the District Court found that the New Year's holiday weekend was a contributing factor. Captain Burrell indicated during his testimony that the Penitentiary was shorthanded at this time, a factor he considered when he decided to place Respondent in the M.O. area. *McCray, supra,* at p. 1213 (App. 41a).

After Respondent's release from M.O. on the morning of January 3, 1972, he was returned to the South Wing



of the Penitentiary. He was seen by Dr. Wood on January 4, and by Dr. Holljes on January 6. Respondent was charged by the Penitentiary with setting his cell on fire and destroying prison property. At a disciplinary hearing on January 6, 1972 he was found guilty and sentenced to serve six (6) months on South Wing and to pay restitution for the damages. His appeal to the Warden was denied.

### B. McCray v. Smith

Respondent testified that on November 20, 1971 he was placed in a cell on the "street side" of the South Wing, but asked to be moved to another cell because that one was in an unsanitary condition. *McCray, supra,* at p. 1211 (App. 37a). Sergeant Smith, who had never met Respondent took Respondent to the lowest tier on the South Wing, where he was showered. Respondent was then placed in a cell on the fourth tier, "yard-side," of the South Wing, where he began "hollering and yelling," demanding his legal materials and his medicated shower. *McCray, supra,* at p. 1211 (App. 37a). Sergeant Smith was told by the Warden of the Penitentiary to provide Respondent with his law books and legal materials while he was in the South Wing. However, these orders were not complied with immediately, because according to the unrebutted testimony of Sgt. Smith, the process of packing and moving personal belongings could take from two to three days to complete. *McCray, supra,* at p. 1211 (App. 37a). There was also testimony during the course of these trials that the Penitentiary had been forced to operate with a substantial shortage of prison personnel. *McCray, supra,* at p. 1211 (App. 37a). The District Court found that this disturbance, quite substantial according

to testimony of both Respondent and Sgt. Smith, prompted Sergeant Smith to remove Respondent McCray from the South Wing and place him in the isolated confinement area (I.C.). *McCray, supra,* at p. 1211 (App. 38a). The District Court further found that this measure was taken to avoid the possibility of causing a greater disturbance among the inmates.

In the process of transferring Respondent to the I.C. area, Respondent began shouting insults and threatening to do bodily harm to himself. Interpreting these threats as an indication of mental and emotional instability, and having personal knowledge of prior incidents involving inmates in isolation who had committed suicide, Sergeant Smith decided to strip McCray and remove the mattress from the cell. He testified that he felt it was better to subject Respondent to some discomfort rather than risk self-inflicted injury. *McCray, supra,* at p. 1211 (App. 38a).

Respondent's new cell, I.C. #5, was about 4-5 feet wide, 12-16 feet long, and 12 feet high. It had concrete walls, a concrete ceiling, and a concrete floor. At the front of the cell was a solid, metal door and a barred, grilled-type door, either or both of which could be closed. There was a toilet and a sink in the cell, and on the floor was a concrete slab about 9 feet long, 3 feet wide, and 12 inches high. Normally a mattress is placed on this slab to serve as the inmate's bed.

The District Court found that notification of one's immediate supervisor is the recommended procedure upon placing an inmate in the I.C. area. The District Court found as well that there was no evidence, other than the absence of any reference to Respondent in the log book during this period, to indicate that Sgt. Smith had not complied with this directive. *McCray, supra,* at



p. 1212 (App. 38a). Sergeant Smith testified that, although they try to log all occurrances, if there is considerable inmate activity, guards are often unable to make these entries. *McCray, supra,* at p. 1212 (App. 38a).

The next morning Sergeant Smith checked Respondent, discovered that he had defecated in a cup and smeared this excrement throughout the cell. Sgt. Smith then notified the psychologist, Mr. Musk, and decided to retain Respondent in I.C. for an additional day. The District Court found that while it appeared that Mr. Musk might not have examined Respondent before he was removed from the I.C. area, it was possible that this may have been due to the fact that November 21 was a Sunday. *McCray, supra,* at p. 1212 (App. 39a). Mr. Musk testified that he had no recollection of talking to Respondent about this specific incident, and had no record of such a meeting. *McCray, supra,* at p. 1212 (App. 39a). He indicated, however, that he had spoken to Respondent on at least ten occasions, but had made a record of only four of these visits. *McCray, supra,* at p. 1212 (App. 39a).

Respondent admitted that on several occasions he had requested to be placed in the I.C. area because it was more conducive to preparation of legal papers, but alleged that he was not given any showers during the two days that he was confined at this time. The records introduced at the trial clearly indicate that he was given a shower on November 20. *McCray, supra,* at p. 1212, 1216 (App. 39a, 46a). On November 22, 1971, Respondent was released from the I.C. area and returned to his cell.

## SUMMARY OF ARGUMENT

The decade of the 1960's brought with it into the Federal Courts a vast increase in the number of cases filed by State prisoners relying upon 42 U.S.C. § 1983 seeking relief from alleged unconstitutional conditions of confinement. The number of petitions filed annually pursuant to § 1983 and, until recently, 28 U.S.C. § 2254, has risen dramatically from 1966 to the present date. In response to numerous suggestions for alternatives to judicial litigation regarding conditions of confinement, the State of Maryland established in 1971 the Inmate Grievance Commission of Maryland to hear all complaints regarding allegations of deprivations of constitutional and statutory rights of inmates confined to correctional institutions of the State of Maryland.

The Inmate Grievance Commission has five members independent of the Division of Correction and the Patuxent Institution, who hear and determine grievances following hearings at which the inmate has the opportunity to produce witnesses and documents, cross-examine witnesses, present evidence in his own behalf and be represented by counsel or counsel substitute. Following a hearing in cases which cannot be informally resolved, the Inmate Grievance Commission issues its findings of fact and order which is then reviewed by the Secretary of Public Safety and Correctional Services who may affirm, reverse or modify the order of the Inmate Grievance Commission. The Secretary then has the authority to order the appropriate official of the institution to carry out the action required by the Inmate Grievance Commission.

The United States District Court in this case found that: the jurisdiction of the Inmate Grievance Commission mirrored the traditional areas of § 1983 jurisdiction



in prisoner cases; the remedy was effective and adequate; and the resolution of prisoner grievances could be obtained more quickly before the Inmate Grievance Commission, which also provided a record for the District Court. Even though the Inmate Grievance Commission did not have the power to award money damages, the District Court found that it was still an effective and adequate remedy as the prisoner complaints were normally bound up with prison administration and the deferral of money damages until a decision was reached by the Inmate Grievance Commission did not render the remedy ineffective.

This Court held in *Monroe v. Pape, infra,* that § 1983 was enacted to override certain kinds of State law, provide a remedy where the state law was inadequate and provide a federal remedy where the state remedy though theoretically adequate, was not available in practice. This Court then stated that under these circumstances the federal remedy was supplementary to the state remedy and that the latter need not be first sought before the federal remedy was invoked.

The prior remedies sought to be invoked in *Monroe* were state judicial remedies which have traditionally been held not to require exhaustion. Following *Monroe,* in *McNeese v. Board of Education, infra,* this Court found that inadequate state administrative remedies did not have to be exhausted and similarly found inadequate remedies in *Damico v. California, infra, Houghton v. Shafer, infra,* and *Carter v. Stanton, infra.* In *King v. Smith, infra,* it was held that a sufficient constitutional challenge to a state regulation did not require exhaustion and, in *Wilwording v. Swenson, infra,* that exhaustion of state remedies was not a prerequisite to an action under 42 U.S.C. § 1983. *Wilwording,* however, appeared to have dealt with state

court remedies. The net result of all of these cases appears to be that state court remedies need not be exhausted prior to the filing of a § 1983 action and that the other cases did not require exhaustion of administrative remedies since the same were inadequate.

In *Preiser v. Rodriguez, infra*, this Court, in discussing conditions of confinement in a habeas corpus setting, indicated the strong policy considerations of comity regarding exhaustion of state remedies under § 2254 but those comments since these involved conditions of confinement were more applicable to § 1983 actions. However, this Court was not presented with an effective state remedy in *Preiser* which would have enabled it to redefine its prior opinions from *Monroe* to *Carter*.

While the cases on their face apparently establish the general principle that exhaustion could never be required in a § 1983 action, various exceptions have been engrafted upon that rule. When a plaintiff is subjected to prospective injury only, he is required to exhaust adequate state administrative remedies. Exhaustion has also been required where the suit could properly have been brought under another statute. Further, the requirement of exhaustion of federal administrative remedies provides support for a similar requirement under these circumstances.

The liberalization of the rule that exhaustion of state administrative remedies was not required seemed to come from a feeling that the individual states were not prepared to protect the interests of their citizens. However, the law is clear that the State of Maryland, by its actions, is sensitive to the rights of its citizens and is taking positive steps to provide a remedy to enforce those rights.



The Inmate Grievance Commission is a unique and demonstrably effective approach to prison litigation regarding conditions of confinement. However, the United States Court of Appeals for the Fourth Circuit, in this case, felt compelled, by prior decisions of this Court, to reject Maryland's argument and also indicated that it could not entertain the policy considerations which might justify a different result. While *stare decisis* is an important principle, there is no reason for its invocation in these circumstances where individuals have not arranged their affairs in reliance on the expected stability of decision as in the commercial field. It is clear from the findings of the District Court in this case that § 1983 is being abused by prisoners, that the number of civil rights complaints being filed are a burden on the administration of justice, that a large percentage of these are totally without merit, and that there is a need for alternatives.

Traditionally, exhaustion has been favored. For example, state remedies are not by-passed: when the State has an interest in regulation; to avoid strained relations with other agencies of government; to promote efficiency by pursuing a more flexible, less time consuming and expensive remedy; to provide a record and factual background; to allow the administrative agency to exercise its expertise; to provide an incentive to state administrative agencies to do their job; and to assure the courts that the decisions which reach them are final. Based on the traditional reasons for exhaustion, numerous proposals have been made regarding alternatives to litigation under § 1983. These include deferral to state agencies, a jurisdictional requirement, full exhaustion of adequate state administrative remedies, an exhaustion requirement based on the Administrative Procedure Act, and an exhaustion requirement where

the injury is to an individual only and not to a class of persons.

It is clear that policy considerations require exhaustion when there is an adequate and effective state administrative remedy. The traditional rules requiring exhaustion indicate that in these circumstances, exhaustion would be effective. Recent cases have indicated that prisoners are special classes of citizens who might be required to pursue adequate and effective state administrative remedies. The great number of civil rights complaints filed by state prisoners have had a detrimental impact upon the administration of justice in the United States Courts and the District Court noted that its effect was that legitimate complaints were being delayed. The third element of the legislative intent of § 1983 set out in *Monroe v. Pape* supports a congressional purpose to require an inquiry by the federal courts into the adequacy of the state remedy. Rather than precluding exhaustion, this would support the exhaustion requirement. Further, if the remedy provided by § 1983 is fully supplementary to any state remedy, then this Court's discussion of the three purposes of § 1983 in *Monroe v. Pape* is superfluous.

The United States Court of Appeals for the Fourth Circuit erred in this case when it disregarded the findings of fact by the District Court. It made no independent finding that the District Court was clearly erroneous and reinterpreted the facts as found by the District Court. The Fourth Circuit further erred when it incorporated an administrative directive of the Division of Correction of the State of Maryland into the Bill of Rights as a constitutional guarantee. Further, the Fourth Circuit erred when it made inconsistent findings of fact regarding isolated confinement (not per se cruel and unusual punishment) and confinement to



the mental observation area (per se cruel and unusual punishment) of the Maryland Penitentiary in spite of a finding by the District Court that the two confinement areas were similar and the purposes of confinement in the two instances were the same.

## ARGUMENT

### I.

### EXHAUSTION OF ADEQUATE AND EFFECTIVE STATE ADMINISTRATIVE REMEDIES IS REQUIRED IN AN ACTION BROUGHT BY A STATE PRISONER PURSUANT TO 42 U.S.C. § 1983.

#### A. The Facts Disclose That the Inmate Grievance Commission of Maryland Represents an Adequate and Effective State Administrative Remedy for State Prisoners' Civil Rights Complaints.

##### 1. *Historical Background*

> "Almost 2,000 years ago Juvenal asked: 'Sed Quis Custodiet Ipsos Custodes?' Who will watch the keepers themselves is still a question of critical importance, and the need of a proper solution is never more acute than when the rights of the individual are involved. A declared purpose of the federal constitution is to 'secure the Blessings of Liberty' to the people and their posterity, and under our philosophy of government the rights guaranteed by the constitution of the people are jealously guarded. Curtailment of them is to be permitted only to the extent necessary to maintain the fine balance between the rights of the individual and the rights of society." *State v. McCray*, 267 Md. 111, 114 (1972) (Footnotes omitted).

*In State v. McCray, supra*, at p. 146, the Court of Appeals of Maryland stated that the legislative intent of the Maryland Inmate Grievance Commission Act

was that state prisoners were to exhaust that remedy before filing actions in the state courts regarding conditions of confinement.

Although incarceration does not deprive an individual of ". . . his right to personal security against unlawful invasion . . .", *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), it was not until the middle of the 1960's that intense scrutiny was directed toward the administration of penal institutions and the rights of inmates.

One of the earliest discussions of the rights of prisoners is found in *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964), and the litigation has continued unabated to the present time.[2]

The overwhelming majority of complaints filed in prison administration cases invoke the jurisdiction of the District Courts pursuant to 42 U.S.C. §1983 (hereinafter §1983) and its jurisdictional analogue, 28 U.S.C. §1343, or under 28 U.S.C. §2254, alleging deprivations of constitutionally protected rights.[3] The initial trickle became a storm and the storm a tidal wave. The District Courts soon became overseers of state correctional institutions. Chief Judge Northrop

[2] See for example, *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966); *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971); *Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); and *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970).

[3] Until *Preiser v. Rodriguez*, 411 U.S. 475 (1973), jurisdiction of complaints relating to conditions of confinement was accepted under either 42 U.S.C. §1983 or 28 U.S.C. §2254. After *Preiser, supra*, jurisdiction to test conditions of confinement vested almost exclusively under 42 U.S.C. §1983.



pointed out in *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973) that in fiscal 1972, 3348 civil rights complaints were filed by state prisoners nationwide, an increase of 1435.8% over 1961 and and increase of 14.9% over 1971. For the first half of fiscal 1973, 1891 civil rights complaints were filed by state prisoners. Chief Judge Northrop also noted that at the Appellate level ". . . nearly 31% of the prisoner appeals filed nationwide were filed in the United States Court of Appeals for the Fourth Circuit in fiscal 1972. This percentage rose to 36.1% during the first half of 1973. More importantly, prisoner cases accounted for 38% of all cases filed with the Fourth Circuit in 1972, and for 45.3% for the first part of 1973." *McCray, supra*, at p. 1194 (App. 3a).[4]

Unfettered initial access to federal courts in pro se petitions pursuant to §1983 has led to the substantial backlog of cases alluded to by Chief Judge Northrop. The problem in determining the real issues involved requires the District Court to assume the role of

[4] In fiscal 1966, 218 civil rights complaints were filed by state prisoners in the United States courts nationwide. In contrast, this same figure has grown to 6,128 cases in fiscal 1975. Annual Report of the Director, Administrative Office of the United States Courts, (1975) at p. XI-49. In the District Courts of the Fourth Circuit alone, 1,184 civil rights petitions by state prisoners were filed during fiscal 1975. *ibid.*, at p. A-17. This figure compares significantly with 149 petitions filed in the First Circuit, 547 petitions filed in the Second Circuit, 443 petitions filed in the Third Circuit, 1,620 petitions filed in the Fifth Circuit, 388 petitions filed in the Sixth Circuit, 451 petitions filed in the Seventh Circuit, 492 petitions filed in the Eighth Circuit, 552 petitions filed in the Ninth Circuit, 236 petitions filed in the Tenth Circuit, and 66 petitions filed in the District of Columbia. *ibid.*, pp. A-17, A-19. See also McCormack, Wayne, *The Expansion Of Federal Question Jurisdiction And The Prisoner Complaint Caseload*, Wisc. L. Rev. 1975: 523, 535 Fn. 56, 57.

interpreter (sometimes requiring the insight of a seer or prophet), advocate, arbitrator, investigator, teacher and, in the final stages, the duty of a judge. See, generally, *McCray, supra.* Petitioners do not question the right of prisoners to obtain relief in federal court when their constitutional or statutory rights have been violated. What they submit is important is the point in time or the stage at which such suits should be allowed in federal court. In an address concerning prison conditions, Chief Justice Warren E. Burger stated:

> "We need not and should not abandon or even modify habeas corpus. What we need is to supplement it with flexible, sensible working mechanisms adapted to the modern condition of overcrowded and understaffed prisons . . . *a simple and workable procedure by which every person in confinement who has, or who thinks he has, a grievance or complaint can be heard promptly, fairly and fully.*" Address by Chief Justice Warren E. Burger to the National Association of Attorneys General, at Washington, D.C., February 6, 1970. See also *State v. McCray, supra,* at pp. 141-42 [Emphasis supplied].

The Fourth Circuit similarly commented on the problems and the proposed solutions.

> "While Maryland has recently established an Inmate Grievance Commission, Ann. Code of Md., Art. 41, § 204F (1971 Supp.), to determine and recommend the proper redress for meritorious grievances of inmates of Patuxent and other correctional institutions, we take judicial notice of the fact that the Commission is not yet fully operative. When it is, there will be time enough for the Supreme Court to determine if *Monroe v. Pape,* and, we, our own decisions, should be reexamined. That time is not the present." *Hayes v. Secretary,* 455 F.2d 798, 800 (4th Cir. 1972).



In his *Report on the Federal Judicial Branch — 1973,* 59 A.B.A.J. 1125, Chief Justice Warren E. Burger discussed the problem of prisoner litigation. He stated that in fiscal 1972 more than 16,000 petitions of various types were filed challenging validity of conviction and more than 4,000 additional cases were filed under the Civil Rights Act. After commenting on an obviously trivial complaint alleging the loss of seven packs of cigarettes, the Chief Justice suggested:

> "[W]e use some common sense and devise procedures that give prompt attention to valid complaints without calling on the federal judges and a train of other public employees to deal with three dollars worth of cigarettes." 59 A.B.A.J. at p. 1128.

He suggested certain alternatives:

> "1. Create a statutory administrative procedure for federal prisons to provide for hearing prison complaints administratively within the prison and require that these procedures be exhausted before any proceeding could be filed in federal courts. I believe many states would follow the federal example.
>
> 2. Establish formal grievance procedures in the State systems to hear prisoner complaints as a good many enlightened prison administrators have long since done. The American Bar Association commission dealing with correctional problems continues its important work, and I commend the subject of prisoner grievances to its attention.
>
> 3. Federal judges, acting within their existing authority, should consider referring habeas corpus and civil rights cases brought by prisoners for preliminary consideration by a United States magistrate sitting as a special master and reporting to the court." 59 A.B.A.J. at p. 1128.[5]

---

[5] See also 2 Hofstra L. Rev. 345, 356 (1974) and 5 Rutgers-Camden L. J. 307, 318 (1974).

### 2. *The 1971 Act and the Experience Under the Act.*

In 1971, the Maryland General Assembly enacted Article 41, § 204F, Annotated Code of Maryland which created the Inmate Grievance Commission of Maryland. Encouraged by the Chief Justice of the United States, the Governor of Maryland, and the Attorney General of Maryland, the Inmate Grievance Commission was established to hear and resolve grievances of prisoners confined within the Division of Correction of the State of Maryland and the Patuxent Institution. 59 Opinions of the Attorney General of Maryland 438 (1974).

The Inmate Grievance Commission is an independent agency within the Department of Public Safety and Correctional Services consisting of five members appointed by the Governor with the advice of the Secretary of Public Safety and Correctional Services. Two members of the Commission are lawyers qualified to practice law in the State of Maryland; two are persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services and one member is from the public at large. § 204F(a) and *McCray, supra*, at p. 1202 (App. 18a-20a). At the present time, the Commission consists of James G. Boss, the Chairman and an attorney; James V. Bennett, an attorney, nationally known penologist and retired Director of the Federal Bureau of Prisons; Maceo M. Williams, a former correctional officer at Patuxent Institution, city probation officer and currently an official of the Baltimore Concentrated Employment Program (an anti-poverty program); Edgar A. Fulton, a retired insurance man, currently an industrial relations consultant to the United States Bureau of Prisons and a



member of the Maryland Advisory Board for Corrections, Parole and Probation; and Ralph S. Falconer, a retired employee of the Maryland Department of Parole and Probation. *McCray, supra*, at p. 1202 (App. 18a-20a) (T. 9-12).[6] Dene Lusby is the Executive Director of the Commission. Mr. Lusby is a graduate of the University of Maryland School of Law; he was an associate with the law firm of Weinberg and Green in Baltimore City, an Assistant State's Attorney for Baltimore City and senior trial attorney with the Federal Trade Commission. He was engaged in private practice from 1968 to 1972 prior to his appointment as Executive Director of the Inmate Grievance Commission (T. 26-27).[7]

The statute provides that "[A]ny person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who

---

[6] "T." refers to the transcript of testimony before the United States District Court for the District of Maryland in *McCray, supra*, contained in the Record on Appeal in this case.

[7] As the District Court noted, the Governor of Maryland has ". . . made every effort to appoint to the Commission individuals with knowledge in relevant areas and who are equipped with the perspicacity to make objective judgments, free from any institutional preconceptions of the facts of a particular in-prison incident." *McCray, supra*, at p. 1202 (App. 18a-20a).

Also, the Commission's 1974 budget was $102,200.00, an increase of $53,000.00 from its initial appropriation of 1972. As the budget includes $45,000.00 compensation for the 5 commissioners, it would cover approximately 120 days of service by each commissioner.

RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, A.B.A. COMMISSION ON CORRECTION FACILITIES SERVICES, MARYLAND INMATE GRIEVANCE COMMISSION at pp. 3-4. *(Ombudsman/Grievance Mechanism Profiles — No. 3, (1974)).*

has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission. . . ." § 204F(d). The statute further provides for preliminary review to determine if the grievance or complaint is wholly lacking in merit on its face without a hearing or findings of fact. § 204F(e). After hearing, if the grievance is found to be without merit, it is dismissed by the Commission. § 204F(f)(1). The latter two types of dismissals are the final decision for purposes of judicial review. If the Commission finds in its decision and order that the inmate's complaint is in whole or part meritorious, that Order is forwarded to the Secretary of Public Safety and Correctional Services who must, within fifteen days, either affirm, reverse or modify the order where he disagrees with the findings and conclusions of the Commission. The Secretary has the authority to require the appropriate official of the institution to accept the Decision and Order of the Commission and do whatever is necessary to implement the Commission's findings. § 204F(f)(2). The statute further gives the Commission access to any documentary evidence, authority to require by subpoena attendance and testimony of witnesses and production of all documentary evidence, and the right to administer oaths and affirmations. The inmate is afforded the right to appear before the Commission, to call witnesses subject to relevancy and materiality, to question witnesses and to be represented by an attorney at his own expense. The statute also provides for keeping records, a provision for hearings at the institutions and promulgation of rules and regulations. § 204F(g)-(k). Finally, judicial review is provided following the final decision of the Secretary in the circuit court where the institution is located, limited to a



review of the record to determine ". . . whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements." § 204F(1).

The Inmate Grievance Commission is a separate agency within the Department of Public Safety and Correctional Services, and is an independent agency over which the Secretary of Public Safety and Correctional Services exercises only administrative control, that is, requirements as to budget and appointment of personnel. § 204F(a), (b) (T. 39, 80). Under the statute, the position of the Inmate Grievance Commission is similar to that of a trial court in which certain of its decisions are subject to mandatory review.

The Executive Director of the Inmate Grievance Commission testified in the District Court that complaints are always set for hearing unless withdrawn or resolved, a procedure which is successful in 35 to 40 percent of the cases (T. 28-29, 32). Cases are dismissed over which the Commission does not have jurisdiction, which are on their face without merit, which are withdrawn by the inmate and which are informally resolved (T. 33-34). See *McCray, supra,* at p. 1203 (App. 21a-23a). At the time of the hearing in the District Court, there were 752 administrative dismissals including those which had been informally resolved. *McCray, supra,* at p. 1203 (App. 21a-23a). Other than those instances, the Executive Director testified that a hearing is always set (T. 32). This procedure is not unlike that followed by the United States District Courts which have the right to dismiss a wholly frivolous in forma pauperis suit pursuant to 28 U.S.C. § 1915. See *Peterson v. Nadler,* 452 F.2d 754 (8th Cir. 1971) and *Garner v. Raulston,* 390 F.2d 644 (6th Cir. 1968). However, the Inmate Grievance Commission

does have broader and more flexible power to resolve these grievances.

Pursuant to Article 41, § 204F(e), the Commission and its Executive Director have the power to investigate complaints if necessary and informally resolve the same which negates the need for a hearing. A formal report of the investigation is not given to the Commission if the complaint cannot be resolved and the inmate is advised that an investigation is taking place (T. 23, 40, 51-53). Dene Lusby testified that he does not initially request the consent of the inmate when he initiates informal resolution because ". . . the complaints that I attempt to resolve informally are of a nature that there is no question in my mind that the inmate will be delighted to obtain the relief that he is seeking and that there is no confidentiality involved" (T. 56).

Mr. Lusby further testified that he prepares a file for the Commission which routinely contains no more than the necessary papers filed by the complainant. If an investigation takes place, and he so requests, the inmate is given the information from that investigation (T. 51-53).

An inmate is entitled to representation before the Commission by an attorney at his own expense, or by a law student, or by other inmates pursuant to the Rules and Regulations of the Inmate Grievance Commission. Chief Judge Northrop found that in 30% of the cases an inmate is represented. He further found that there was ". . . no need for the appointment of counsel, at the expense of the State, for the purpose of representing the inmate, as the hearing is solely remedial, not disciplinary or punitive, in nature." *McCray, supra*, at p. 1204 (App. 24a).



Article 41, § 204F(h), states that "The inmate shall have the right to appear before the Commission and shall have the opportunity to call a witness or a reasonable number of witnesses depending upon the circumstances and the nature of the complaint, subject to the discretion of the Commission as to the relevancy of the testimony and questions and the number of witnesses sought to be called. The inmate shall have the reasonable opportunity to question any witnesses who testify before the Commission. Such rights of the inmate shall not be unreasonably withheld or restricted by the Commission." The rules and regulations of the Inmate Grievance Commission, promulgated on November 30, 1971, provide that a complainant before the Commission may call such witnesses as have relevant testimony and may be available at reasonable times and that the Commission may limit the amount of testimony if it is cumulative or repetitive and may further remove the hearing to another place within the State or adjourn the hearing to hear further testimony or argument. Public Safety and Correctional Services, Rule 12.07.00.04 (2) (4). Further pursuant to Rule 12.07.00.04 (5), the Commission may require by subpoena the attendance and testimony of witnesses. The record before the District Court in *McCray, supra,* indicates that the Commission never used its subpoena power because there had never been an indication that it was needed; that there had never been a request for the issuance of a subpoena; and that no witness had ever refused to appear. *McCray, supra,* at p. 1203 (App. 22a-23a) (T. 20-23, 63). The District Court further found that inmates were not unreasonably restricted in their ability to call, cross examine, or require the attendance of witnesses. *Washington v. Boslow*, 375 F. Supp. 1298, 1301 (D. Md. 1974) (App. 62a-63a).

The Rules and Regulations of the Commission provide that a complainant may request the production of documents and records and that the Commission may require by subpoena the production of all documentary evidence. Rule 12.07.00.04 (2) (5). While an inmate does not have the right to full pre-trial discovery, the District Court found that there was no authority for holding that pre-trial discovery is an essential element of due process. "This Court finds that the lack of full discovery does not render the hearing 'unfair.' Cf. *Goldberg v. Kelly . . .*" *Washington, supra,* at p. 1301 (App. 63a). Witnesses before the Commission are not sworn on oath or affirmation as the Commission felt that the ". . . inmate feels much freer to present his case if he is not immediately warned of his problems as to perjury, and so forth. So, we have adopted that and followed that procedure of not requiring the sworn testimony with the feeling that it was for the benefit of the inmate" (T. 15, 22). *See also McCray, supra,* at p. 1204 (App. 24a).[8]

[8] "The plaintiff last asserts that the Inmate Grievance Commission Act does not accord the plaintiff a full and fair hearing within the meaning of the due process clause. In *McCray,* this Court discussed extensively the Inmate Grievance procedures and found that these procedures satisfied the requisites of due process. The plaintiff argues here, however, that at a hearing before the Commission he is unreasonably restricted in his ability to call and cross-examine witnesses and subpoena documents, and that he is unable to engage in pre-trial discovery. An inmate has the right to call a reasonable number of witnesses, subject only to the discretion of the Commission as to the relevancy or cumulative nature of the testimony, and this discretion cannot be unreasonably exercised by the Commission. Md. Ann. Code art. 41 §204F(h) (Supp. 1973). Any unreasonable refusal to allow an inmate to call a witness is reviewable in state court. Again, the inmate has the right to subpoena documents, and this right is subject only to the Commission's determination of the usefulness of the documents in deciding



Pursuant to § 204F (f)(2), if ". . . the Commission in its order finds that the inmate's complaint was in whole or in part meritorious, such order shall be promptly forwarded to the Secretary of Public Safety and Correctional Services. Within 15 days of the receipt of such an order, the Secretary by order shall affirm the order of the Commission, or shall reverse or modify the order where he disagrees with the findings and conclusions of the Commission." The Commission's decisions and orders are analogous to those decisions rendered by trial courts with the provision for a mandatory appeal. Should the Secretary fail to act, the decision and order of the Inmate Grievance Commission would be binding on the appropriate institution. The standards for exercise of power by the Commission, by the Secretary, and by the courts are clearly set out in § 204F (l) where jurisdiction and standards of review are limited to violations of rights protected by federal or state laws or constitutional requirements. This jurisdiction is comparable to the jurisdiction exercised by the Federal District Court in § 1983 actions.

Review by the Secretary of Public Safety is similar to that of a review by an appellate court of a trial court's findings of fact and conclusions of law. These powers were delineated in an Opinion of the Attorney General of Maryland to the Secretary of Public Safety, 59 Opinions of the Attorney General of Maryland, 438 (1974), where it was stated that:

> "Therefore, in those matters where the Inmate Grievance Commission finds that the grievance or complaint does amount to a deprivation of the

the merits of the claim. Public Safety and Correctional Services R. 12.07.00.04(2) (Inmate Grievances). This right may not be unreasonably restricted by the Commission, and any such action is reviewable in State court." *Washington, supra,* at p. 1301 (App. 62a-63a).

inmate's constitutional and legal rights and forwards its decision and order to the Secretary, the Secretary should review said decision and order in accordance with the provisions of subsection (f)(2) in the same manner as that of a court of review, namely: (1) accept the findings of fact as conclusive provided such findings contain a concise statement of conclusions upon each contested issue of fact; (2) determine whether the facts, as found by the Commission, support a determination that the inmate has been deprived of his constitutional and/or legal rights or that administrative relief is required; and (3) determine whether the Commission's order is appropriate. The Secretary is empowered, nevertheless, to remand the decision to the Commission for further proceedings in the event he finds that the matter should be further developed factually. In this regard, it should be pointed out that the Secretary's final decision is subject to judicial review upon appeal by the complaining inmate, whereas the officials and employees of the Division of Correction or of Patuxent Institution do not have such right."

Dene Lusby testified before the District Court that the inmate is notified of his right to appeal; that all inmates sentenced to imprisonment in the State of Maryland or referred to Patuxent Institution for diagnosis and evaluation are first sent to the Maryland Reception, Diagnostic, and Classification Center where they receive copies of an information sheet supplied by the Inmate Grievance Commission which clearly spells out the appellate process (T. 49-50).

At the time of the hearing in the District Court in *Washington v. Boslow*, *supra*, the time required to exhaust state administrative remedies was approximately 5 months, that is, the average time for decision



in those cases was 24.86 weeks.[9] More recent statistics indicate that that time factor has dropped considerably. For the one year period between October 17, 1974 and October 17, 1975 the amount of time which elapsed between the time of filing and the date of the Commission's order in cases which went to hearing was 94.9 days (13.56 weeks). National Association of Attorneys General, Committee on the Office of the Attorney General, *Correctional Services Newsletter*, Volume 4 Number 9, at p. 9 (Nov. 26, 1975).[10]

The District Court considered the factors necessary to determine whether to require exhaustion:

> "'Relevant to a resolution of whether or not exhaustion is required are considerations of the adequacy of the available state remedy, of whether or not it is really a remedy in fact as distinguished from being a remedy in theory, and of the extent of the state's interest in the subject matter of the litigation'." *McCray*, *supra*, at p. 1201 (App. 18a),

---

[9] These figures are contained in the Appendix to Respondent Washington's Brief in the Fourth Circuits. (A. 275a-282a)

[10] The amount of time which elapsed between the date of filing of all grievances and final disposition is 40.6 days. The amount of time which elapsed between grievances which are administratively disposed of by the Executive Director from the date of filing and disposition is 12 days. The amount of time which elapsed as to grievances which are heard by the Commission between filing and date of hearing is 47.7 days. The amount of time which elapsed between the date of the hearing and the date of the order of the Inmate Grievance Commission is 47.2 days. *Correctional Services Newsletter*, *supra*, at p. 9.

See also, *Report Of The Study Group On The Caseload Of The Supreme Court*, 57 F.R.D. 573 (1972). In that article, the creation of a special non-judicial federal institution is advocated to try and settle complaints by prisoners of conditions of confinement. Three months was indicated as the amount of time this institution would have to resolve the grievances. 57 F.R.D. at pp. 586-88.

citing *Armsden v. Cataldo*, 315 F. Supp. 129, 131 (D. Mass. 1970).[11]

Regarding the above tests, Chief Judge Northrop stated that the court ". . . must analyze the theoretical due process adequacy of the state remedy, particularly from the standpoint of making sure the remedy does not contain the forbidden indicia of pre-judgment which renders exhaustion inappropriate." Secondly, the court must look at the ". . . remedy in practice, to see that it is being administered in an even-handed and fair manner." Thirdly, the court must determine the extent of the State interest in the subject matter of the federal litigation. *McCray, supra*, at p. 1201 (App. 18a).

The Commission's jurisdiction ". . . mirrors the traditional areas of §1983 jurisdiction in prisoner cases." See *McCray, supra*, at pp. 1202, 1208 (App. 19a-20a, 30a-32a). The District Court found that not only does the Statute mirror §1983 juridiction, but the Commission also has those equity powers exercised by

[11] A similar test for the adequacy of a state administrative remedy was a suggestion that the standard used should be that of the Civil Rights Act of 1968, that is, that state remedies be substantially equivalent to the federal remedies. *Limiting The §1983 Action In The Wake of Monroe v. Pape*, 82 Harv. L. Rev. 1486, 1497 (1969), (Hereinafter 82 Harv.L. Rev. at p. ____.)

In *Hayes v. Cape Henlopen School District*, 341 F. Supp. 823 (D. Del. 1972), the Court determined what due process rights were necessary prior to requiring exhaustion before state administrative bodies.

> "The right to hear and refute evidence presented against oneself, the right to present evidence on one's behalf, the right to call witnesses on one's behalf and the right to an impartial tribunal would most likely be the components of an administrative procedure sufficiently adequate to require exhaustion prior to commencing a suit under Section 1983 to vindicate the interference with a constitutional right." *Hayes, supra*, at p. 831.



the federal Courts. *McCray, supra*, at p. 1208 (App. 31a-32a). The testimony before the District Court was that the Commission had the jurisdiction to entertain class actions, grant injunctive relief, consider administrative matters and recommend changes in policies. *McCray, supra*, at pp. 1208-1209 (App. 31a-34a) (T. 42, 43, 45-47). Further, ". . . when a grievance requesting only damages is filed, a hearing is held for the purpose of, *inter alia*, determining the validity of the claim. If the grievance is meritorious in whole or in part, the Commission would then recommend procedures designed to prevent a recurrence of the situation." *Washington, supra*, at p. 1300 (App. 61a).

Chief Judge Northrop further found that the case load of federal judges had increased tremendously; that the length of time which elapsed from the date a prisoner filed a meritorious claim to the date of disposition was so great that often neither equitable nor legal relief was effective in protecting his rights; that these suits would continue to consume more and more of the federal courts' time with the resulting longer and longer delay; and because civil rights complaints filed in federal court are usually accorded lower priority; the ". . . powers of the Commission can, in most cases, be exercised considerably more quickly to remedy offensive patterns of official conduct than can the powers of the federal courts" and that the practical enforceability of orders is greater when the person rendering the order has the power to discipline or fire, did not make the average time from the filing of a complaint to its decision excessive. See *McCray, supra*, at pp. 1195, 1209 (App. 5a-7a, 33a-34a).

From the time a case is at issue until trial, the median time in the United States District Court for the District of Maryland is eleven months. *1973 Annual Report of Director, Administrative Director of the United States*

*Courts*. Although this is the median time in the District Court, prisoners habeas corpus and civil rights cases generally remain on the docket for much longer periods of time. Much of the time spent by the District Court is used to clarify the issues and the records and proceedings of the Commission will facilitate handling of the civil rights complaints when they are filed in the District Court.

> "While a determination of the Grievance Commission or the state courts on the merits of a prisoner's claim is not binding on this Court, a preliminary indication of validity serves as a valuable aid to a federal court. With 103 prisoner civil rights cases presently pending in the District of Maryland, a meritorious claim, of *which there are few*, in all likelihood cannot possibly be processed as rapidly as the State grievance procedure. Initial action by the Inmate Grievance Commission serves to alert this Court to a case in which constitutional deprivations are likely to have occurred, and this Court can move the case into its regular trial calendar.
>
> "A reasonably expeditious resolution of a prisoner's grievance can then be obtained since this Court will have before it a complete record of the controversy. Each hearing before the Commission is recorded on a Voice Writer and transcribed when an inmate seeks judicial review in the state courts. The transcript, coupled with the findings of the Commission and state courts, can be employed by this Court to arrive at the central issues for trial, thereby significantly reducing the trial time involved.
>
> "Thus the relief available from the Inmate Grievance Commission, although not exactly comparable to an award of damages, is critical to the welfare of the inmate, to the proper administration of the correctional institution, and to the expeditious resolution of the inmate's grievance." *Washington, supra*, at p. 1300 (App. 61a-62a). [Emphasis supplied.]



The District Court then found that the Inmate Grievance Commission was an effective remedy which ". . . assure[d] a detached and unbiased resolution of particular cases, culminating in judicial review of the administrative adjudications." *McCray, supra*, at p. 1202 (App. 19a-20a). After finding that the Inmate Grievance Commission of Maryland was an effective and adequate remedy the District Court held that:

> "However, the only thing which the imposition of this exhaustion requirement would do in these cases is to work a *postponement* of the ultimate award of damages in a meritorious § 1983 suit. . . . Of course, upon exhaustion of the State remedy, an inmate, in a proper case may still call upon the equity power of the federal court if the exercise thereof is needed in a particular case. If, of course, the remedy of damages is needed to make a prisoner whole again in a particular case, that remedy will likewise be available to the prisoner after he has exhausted the state administrative procedure. . . . Unlike the situation with respect to injunctive or other equity-type relief, there is no sense of immediacy attendant upon the awarding of money damages to redress particular deprivations of constitutional rights. . . . At any rate, it is clear that whatever postponement of the right to money damages under § 1983 is worked because of the imposition of an exhaustion requirement does not amount to a deprivation of the ultimate right to such relief in theory nor is it a deprivation in practical effect. This is true because an award of money does not require the immediate attention which ought to be given to demands for equitable relief, which in fact is given under Maryland procedure. The key point is that the ultimate right to damages is preserved during the complainant's pursuit of his state administrative remedies, and is not destroyed by a requirement that he resort to these remedies before bringing his federal action under § 1983.

> "Therefore, this Court concludes that before it will exercise jurisdiction over a prisoner § 1983 complaint, the inmate must exhaust the available state administrative remedy provided by the Maryland Inmate Grievance Commission procedure. Even if the complaint seeks only monetary damages, this avenue of relief should be exhausted. The claim for monetary damages is inextricably tied to prison regulations and disciplinary procedures. The Maryland Inmate Grievance Commission provides a forum with built-in judicial review which can more expertly sort out the meritorious from the frivolous." *McCray, supra*, at pp. 1208-1210 (App. 30a-35a).

See also *Washington v. Boslow, supra; Stokes v. McClellan*, Civil 73-1182-B, (D. Md. Memorandum and Order filed April 1, 1974) (App. 71a); and *Hyde v. Fitzberger*, 365 F. Supp. 1021 (D. Md. 1972).[12]

[12] The types of grievances and their percentages for fiscal 1974 received by the Inmate Grievance Commission are detailed below:

| *Type of Complaint Received* | *Number* | *Percent* |
|---|---|---|
| Adjustment Team Appeals | 299 | 36 |
| Classification Actions | 197 | 24 |
| Property | 112 | 13 |
| Medical | 47 | 6 |
| Clerical Error | 40 | 5 |
| Non-physical Abuse | 32 | 4 |
| Living Conditions | 22 | 2 |
| Judicial | 21 | 2 |
| Parole | 13 | 1 |
| Commissary | 9 | 1 |
| Visitors | 7 | 1 |
| General Inquires | 6 | 1 |
| Physical Abuse | 13 | 1 |
| Mail | 5 | 1 |
| Legal Assistance | 4 | .5 |
| Religious | 4 | .5 |
| Reading Materials | 3 | .5 |
| Non-penal Institutionalization | 3 | .5 |
| TOTALS | 837 | 100 |

*Correctional Services Newsletter, supra*, at p. 9.



## B. PRIOR DECISIONS OF THIS COURT DO NOT FORECLOSE THE REQUIREMENT THAT A STATE PRISONER MUST EXHAUST MARYLAND'S ADMINISTRATIVE REMEDIES BEFORE BRINGING AN ACTION PURSUANT TO 42 U.S.C. §1983.

The District Court pointed out that following the passage in 1871 of the current 42 U.S.C. § 1983 the same ". . . received the narrowest of constructions. See, e.g., *Hemsley v. Myers*, 45 F. 283 (CCD Kan. 1891)." *McCray, supra*, at p. 1196 (App. 8a). It was also generally thought until 1961 that exhaustion of state administrative remedies was required prior to the filing of an action pursuant to § 1983. *See Dove v. Parham*, 282 F.2d 256 (8th Cir. 1960), and *Covington v. Edwards*, 264 F.2d 780 (4th Cir. 1959).[13]

### 1. *Monroe v. Pape*

In *Monroe v. Pape*, 365 U.S. 167 (1961), allegations of outrageous conduct on the part of certain Chicago police officers prompted this Court to re-evaluate and reinterpret 42 U.S.C. § 1983.[14] In discussing the history

[13] To the same effect see 82 Harv. L. Rev., *supra*, at pp. 1486-87, 1500; Pfeifer, Kristin, *Exhaustion Of State Administrative Remedies Under The Civil Rights Act*, 8 Ind. L. Rev. 565, 570 (1975); Sullivan, Barry, *Exhaustion Of State Administrative Remedies In § 1983 Cases*, 41 U. of Chi. L. Rev. 537, 542 (1974); *Exhaustion Of State Remedies Under The Civil Rights Act*, 68 Colum. L. Rev. 1201 (1968) and Davis, Bryan R., *State Prisoners' Suits; Proper Forum, Choice Of Remedy, And Effect Of Judgment*, 51 Tex. L. Rev. 1364, 1371 (1973).

[14] Although the facts of *Monroe* are fairly notorious, suffice it to say that 13 Chicago police officers broke into Monroe's house in the middle of the night, forced Monroe's family to stand naked in the middle of the living room while they ransacked each room, emptying drawers and ripping mattress covers. Subsequently, Monroe was detained on open charges for ten hours at the police station, was not taken before a magistrate and was not permitted to call his family

of § 1983, Justice Douglas noted that the Act grew out of a set of circumstances existing at the time of the passage of the Act which required redress.

> "'A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. * * *'." *Monroe, supra*, at pp. 172-173.

Quoting extensively from the debates surrounding the passage of 42 U.S.C. § 1983, Justice Douglas reiterated that the purpose of the statute was to provide a remedy ". . . against those who representing a State in some capacity were unable or unwilling to enforce a state law"; ". . . to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens . . . denied by the state agencies." *Monroe, supra*, at pp. 176, 180.[15]

---

or attorney. The police officers had no arrest or search and seizure warrant. *Monroe, supra*, at p. 169.

[15] In *Sullivan, supra*, the author notes that Justice Brennan in *District of Columbia v. Carter*, 409 U.S. 418 (1973) indicated that the analysis of the purposes of the scope of § 1983 ". . . must take cognizance of the events and passions of the time at which it was enacted . . . .". *District of Columbia, supra*, at p. 425. *Sullivan, supra*, at p. 547. It is also noted in *82 Harv. L. Rev., supra*, that § 1983 was loosely and blindly drafted. 82 Harv. L. Rev. at p. 1507.



The purposes of the Act were to: (1) override certain kinds of state laws; (2) provide a remedy where state law was inadequate and (3) to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Monroe, supra*, at pp. 173-174. After stating the purposes of the Act, and the reasons for its enactment, this Court then pushed one step further when it stated that "[I]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe, supra*, at p. 183. It is clear from the context of the opinion in *Monroe* that although the factual situation therein did not fall within the aims of § 1983, the facts of that case required resolution in a federal court. The underlying thrust of the opinion in *Monroe* was that although there were state procedures in existence, they fell within the third aim of § 1983, that is, that a remedy adequate in theory was not adequate in practice. *Monroe, supra*, at p. 183, and *McCray, supra*, at pp. 1196-1197 (7a-11a).[16]

In his dissent, Justice Frankfurter concluded that § 1983 was meant to cover only those situations where an agent of the state acted pursuant to some state law, custom or usage. He concluded that as Illinois had held

---

[16] *Pfeifer, supra*, indicated that there was nothing in *Monroe* which ". . . pertained to the exhaustion of state administrative remedies. The Court's decision that judicial remedies need not be exhausted was not a remarkable development or change in the existing law. Exhaustion of judicial remedies had generally not been required before relief was sought in a federal court." *Pfeifer, supra*, at p. 571. It is also interesting to note that the issue of exhaustion was not raised in the Respondent's brief in *Monroe* which indicated ". . . that their exhaustion argument had been given up by the time the case reached the Supreme Court." *Sullivan, supra*, at p. 543.

such intrusions as occurred in *Monroe* to be unlawful, the complaint would fail to state a claim under § 1983. His conclusion was premised on the fact that where state law shields the offender, it would appear unlikely that the state would set aside its own decisions. He reasoned that, as to the adequacy of state court protection, there was a distinction between ". . . injuries sanctioned by state law (as to which there can never be state-court redress, if at all, unless (1) the state courts are sufficiently receptive to a federal claim to declare their own law unconstitutional, or (2) the litigant persists through a tortuous and protracted process of appeals, after a state trial court has found the facts, through the state court system to the Supreme Court) and injuries not sanctioned by state law." *Monroe, supra,* at p. 249. See also pp. 255, 258. Historically, Justice Frankfurter concluded:

> "Rather, all the evidence converges to the conclusion that Congress by § 1979 [42 U.S.C. 1983] created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom, or usage' sanctioned the grievance complained of." *Monroe, supra,* at p. 237.

An immediate right to federal relief would exist only in those situations where the state would seek to shield the responsible individuals under the special barrier of state authority. *Monroe, supra,* at p. 239.

Justice Frankfurter further remarked in his dissent that the facts of *Monroe, supra,* were outrageous and implied that such may have been responsible for the decision of the Court. *Monroe, supra,* at p. 210. See also the dissenting opinion of Mr. Justice Black in *Goldberg v. Kelly,* 397 U.S. 254 (1970). Coupled with Justice



Frankfurter's clear indication that the decision in *Monroe* was based on its facts, and his discussion of the coverage of § 1983, it is submitted that *Monroe* did not forbid, at least in certain instances, exhaustion of state remedies such as are presented in the instant case.

In 82 Harv. L. Rev., *supra,* it is noted that the second and third purposes enunciated by Justice Douglas were amply supported by ". . . indications in the legislative history of some of the mischiefs at which the bill was aimed — state laws and practices effectively barring state court remedies for some persons deprived of federal rights and inability or unwillingness of states to enforce remedies on their books." 82 Harv. L. Rev. at p. 1489. The author then indicates that the fact situation in *Monroe* fell within none of these purposes and concluded that if § 1983 was to be fully supplementary, § 1983 ". . . is so broadened that the second and third purposes are completely subsumed and made redundant." 82 Harv. L. Rev. at pp. 1489-90. "The second and third congressional purposes — to provide a federal remedy where the state remedy is inadequate on its face or in practice — require application of the exhaustion principle for their fulfillment. If the threshold for federal intervention is the inadequacy of the state remedy, it is unreasonable to foreclose a state officer with the willingness and authority to correct the errors of his subordinates from doing so. If Congress sought to provide a federal remedy where the state remedy is not adequate in fact, it follows that the legislative intent requires adequate remedies to be exhausted. The third element of congressional purpose requires that the federal court inquire not only into the state remedy adequacy as it appears from statute and regulation, but also its adequacy in practice. Rather than precluding exhaustion, this element supports the exhaustion

requirement, since there is no reason to distinguish between adequate and inadequate remedies if the exhaustion principle is to be abrogated in all section 1983 cases." *Sullivan, supra,* at pp. 553-554.

In *Egner v. Texas City Ind. School Dist.*, 338 F. Supp. 931 (S.D. Tex. 1972), that court dealt with a civil rights action arising in the context of a school disciplinary case. In its discussion of the exhaustion doctrine, the Court reviewed the import of *Monroe v. Pape, supra.* After first setting out the three guidelines for defining the proper basis for § 1983 actions, Judge Noel referred to the language in *Monroe* that the federal remedy was supplementary to the state remedy.

> "There are *two ways to construe the foregoing quotation. First, it might be thought that the word 'supplementary' was used in the sense of 'supersessive' or 'subsuming', thus establishing a fourth comprehensive statutory purpose* in rendering the existence and adequacy of state remedies utterly immaterial. On the other hand, *reading in context, the quoted language can be taken as a reiteration of the third statutory purpose, to wit: the providing of a federal remedy where the state remedy, though theoretically available, was in practice illusory.* In *Schwartz v. Galveston Ind. School Dist.*, 309 F. Supp. 1034 (S.D. Tex. 1970)], this Court took the view and still holds the view that the second reading of the 'supplementary' language is the correct one for the following reasons:
>
> (a) This Court's thorough examination of the setting and legislative history of Section 1983
>
> > . . . make it clear that the *Act was not adopted to supercede state laws affording remedies for derelictions by state officials.* Rather, it was enacted to provide *a remedy only where one either did not exist or for some reason an existing remedy was unenforced or otherwise insufficient.*



> *Schwartz*, 309 F. Supp. at 1041." *Egner, supra*, at pp. 934-935. [Emphasis supplied]

Judge Noel further stated that:

> "To read the Court's 'supplementary' language as creating a fourth and virtually unlimited occasion for the application of Section 1983 would render superfluous and redundant its previous discussion of the second and third statutory purposes. If it is to be held that Section 1983 provides an all-encompassing federal constitutional remedy to be applied without regard to state remedies, then the substantial portion of the opinion devoted to discussing the limited curative purpose of the statute must be viewed as a mere scholarly exercise. Such a construction is, of course, unwarranted." Egner, supra, at pp. 935-936.

Finally, Judge Noel, in discussing *Askew v. Hargrave*, 401 U.S. 476 (1971) (per curiam), noted that ". . . the lower court's reliance upon *Monroe* was misplaced, the Supreme Court observed that, '*Monroe v. Pape* is not in point, for there "the state remedy, though adequate in theory, was not available in practice' . . . In view of this unambiguous statement in *Askew*, disputation about a possible supplementary fourth purpose should now be put to rest, for we have it on the highest authority that the Supreme Court itself views *Monroe* as falling within the third statutory purpose of Section 1983, which is to provide a federal forum only when a state remedy is adequate on its face but in practice unavailable." *Egner, supra*, at p. 936.[17]

[17] There have been numerous theories as to the reasons for the expansion of the non-exhaustion rule in § 1983 cases. *McCormack, supra*, posits three separate factors. First, he points to the revolution in individual liberties and the ". . . breakdown of traditional feelings that private citizens should not challenge the actions of their betters in government." Secondly, there is an indication of a preference for a federal

### 2. *Six Post-Monroe Cases*

*Following on the heels of Monroe, supra,* was *McNeese v. Board of Education*, 373 U.S. 668 (1963). In *McNeese*, this Court in a § 1983 action involving school boundaries held that failure to exhaust administrative remedies would not be required in a § 1983 action. But there, as this Court pointed out, the administrative official, the superintendent of schools could only ask the Attorney General to rectify the complaint by an appropriate proceeding in court, if he found the complaint to be meritorious. Therefore, the remedy was not adequate in that the protections afforded were so tenuous that it was not necessary to resort to them. *McNeese, supra,* at pp. 674-675. This Court also noted that the superintendent had no power to order corrective action and could only take steps leading to a remedy in state court, a requirement which was rejected in *Monroe, supra. McNeese, supra,* at p. 675.

> "Apparently no Illinois cases have held that the Superintendent has authority to withhold funds once he has received an affidavit from the district, even if he determines that the affidavit is false. In any event, the withholding of state aid is at best only an indirect sanction of Fourteenth Amendment rights. When federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." *McNeese, supra,* at p. 676. *See also* 82 Harv. L. Rev., *supra,* at pp. 1490, 1501.

Further, it is clear that the ultimate remedy in *McNeese* was judicial in that the request for action would have been from the superintendent of schools to the Attorney General to bring suit. See *Pfeifer, supra,* at pp. 570, 572-573.

In his dissent in *McNeese,* Justice Harlan indicated that the state procedure provided sanctions which should remove the case from the general rule that exhaustion is not required. *McNeese, supra,* at p. 678.

After *McNeese,* the situation appeared to be that resort to state court remedies was not required before filing a § 1983 action, nor was resort to a state administrative remedy required when that administrative remedy was inadequate and where the state administrator had no power to correct the wrong. *Kochie v. Norton,* 343 F. Supp. 956, 958-959 (D. Conn. 1972), *see also McCray, supra,* at p. 1197 (App. 9a-11a).

Following *McNeese, supra,* was *Damico v. California,* 389 U.S. 416 (1967) (per curiam) where this Court again reiterated that an action under § 1983 could not be defeated because relief was not initially sought under state law which provided an administrative remedy. *Damico, supra,* at p. 417. *McNeese* and *Monroe* were cited as controlling authority.[18]

---

over a state forum to litigate these issues, the theory being that federal judges on the average are better than their state brethren due to selection processes. Thirdly, *McCormack* indicates that the social climate during the last twenty years has changed and that during the decade of the 1960's, certain federal judges ". . . began to develop a marked humanistic approach to law. Reflecting perhaps a broad societal yearning for simplicity and individualism, they began to balance the scales of justice back toward the individual from government and big business." *McCormack, supra,* at pp. 529-30.

[18] Other observations regarding the decision in *Damico, supra,* were that in the Opinion, the citation to *McNeese* was not to that part of the Opinion ". . . in which the *McNeese* Court gave its holding but those in which it interpreted *Monroe*" and that the words "an administrative" remedy were inserted by this Honorable Court in *Damico.*" 82 Harv. L. Rev. at p. 1491 and *Pfeifer, supra,* at p. 574. Further, as the suit was for injunctive and declaratory relief that the state statute was unconstitutional and since the administrative agency could not make such a declaration, the administrative remedy was inadequate. *Pfeifer, supra,* at p. 575.

In his dissent, Justice Harlan stated that he ". . . did not at the time and do not now fully understand the Court's opinion in *McNeese* the net result of the case as I see it was that the right to assert, in a federal court, that state officials had acted in a manner depriving the plaintiff of clear constitutional rights could not be delayed by the interposition of intentionally or unintentionally inadequate state remedies for the alleged discrimination." *Damico, supra,* at pp. 418-419. Justice Harlan further stated that in this case, Congress had specified a state forum for the resolution of grievances and that this decision should not have been made per curiam without briefs or oral arguments. *Damico, supra,* at pp. 419-420. Justice Harlan further explained his disagreement with *Damico* and his interpretation of *McNeese* as follows:

> "The source of my difficulty is a compound of the occasional use of language broader than was necessary or warranted by the facts as the majority viewed them, and of my own disagreement, with the majority's view of the facts. In Monroe v. Pape, 385 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492, in an opinion which I joined, the Court declared that one complaining of unlawful search and seizure by state officials could sue them in a federal court under 42 U.S.C. §1983, notwithstanding the availability of similar remedies under state law. That case did not say that one who is engaged in a course of dealing with an administrative agency may bypass the orderly procedures established by that agency and the procedures for review of agency action and sue its members individually at any stage. In *McNeese* it was the prevailing view, with which I disagreed under the circumstances, that the administrative procedures established by the State were inadequate for the vindication of federal rights. Reading *Monroe* to have interpreted 42 U.S.C. §1983 'to provide a remedy where state law was inadequate, [and] "to provide a federal



> remedy where the state remedy, though adequate in theory, was not available in practice",' 373 U.S., at 672, 83 S. Ct., at 1435, the Court concluded that '[w]hen federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary.' Id., at 676, 83 S. Ct., at 1438.
>
> The majority opinion in *McNeese* also, however, attributed to *Monroe* the establishment of the principle that 42 U.S.C. §1983 provides a 'supplementary' remedy to any a State might have. *This language is now interpreted by the Court to mean that there can be no requirement that a person dealing with an administrative agency continue to deal with it in an orderly fashion, no matter how adequate his remedy there. If this is what the majority opinion in McNeese meant to say, its dictum was gratuitous both in the sense that it was not compelled by the facts as the court viewed them and in the same sense that it was an incorrect interpretation of Monroe." Damico, supra,* at p. 419 [Emphasis supplied.]

As Judge Newman pointed out in *Kochie, supra,* 343 F. Supp. at p. 959, the Supreme Court's page reference to *McNeese* in *Damico* was to that part of the opinion where the Supreme Court had rejected the requirement of pursuing state court remedies. Judge Newman further stated that:

> "Even if the interpolation of the word 'administrative' was warranted, it could at most refer to the type of administrative remedy rejected in the latter portion of the *McNeese* opinion — namely, a remedy which is either beyond the power of the administrator or which cannot provide adequate protection to the right allegedly impaired." *Kochie, supra,* at p. 959. See also *McCray, supra,* at p. 1197 (App. 9a-11a).[19]

[19] "An additional justification for prompt recourse to the federal courts in *Damico* was the fact that the welfare program in question was, at bottom, federal." 68 Colum. L. Rev. at p. 1207, fn. 43.

In *King v. Smith*, 392 U.S. 309 (1968), which involved a challenge to the constitutionality of Alabama's "substitute father" regulation, this Court disposed of the issue of exhaustion in a footnote. 392 U.S. at p. 312, n. 4 The rational of the decision was that remedies did not have to be exhausted when there was a substantial constitutional challenge sufficient to require the convening of a three-judge court although there was an implication in that case that exhaustion might be required in a case of less significance. *See* 82 Harv. L. Rev. at p. 1500 and *Pfeifer, supra.*, at p. 575.[20]

*Houghton v. Shafer*, 392 U.S. 639 (1968), involved a state prisoner who filed suit pursuant to § 1983 and had been required to exhaust state administrative remedies. This Court held that ". . . exhaustion of only administrative remedies would not be required of a § 1983 prisoner-plaintiff where the state Attorney General, the officer to whom ultimate administrative appeal was to be taken, had already indicated his prejudgment of the case, thereby making resort to the administrative remedy an exercise in futility." *McCray, supra*, at p. 1197 (App. 9a-11a). *See also Kochie, supra*, at p. 959. This Court then added its admonition citing *Monroe, supra*, that resort to such remedies was unnecessary. *See also* 82 Harv. L. Rev. at p. 1501; *McCormack, supra*, at p. 541 and *Pfeifer, supra*, at pp. 575-576.[21]

---

[20] "If such a hint does indicate some flexibility about the no-exhaustion rule, the Court might be willing to accord weight to factors other than importance of the constitutional questions raised, such as an especially strong state interest in having state administrative remedies resorted to first." 82 Harv. L. Rev. at p. 1501.

[21] While this Court noted ". . . *Houghton's* elimination of the exhaustion requirement . . .", there was a ". . . careful examination of the adequacy of the administrative remedy. Since the remedy was inadequate, the plaintiff was not required to exhaust it." *Pfeifer, supra*, at p. 565.



*Wilwording v. Swenson*, 404 U.S. 249 (1971), involved an action filed by state prisoners under 28 U.S.C. § 2254. This Court held that the complaints regarding conditions of confinement stated a good cause of action pursuant to § 1983 without requiring exhaustion of state administrative remedies. This Court, however, ostensibly reaffirming the non-exhaustion doctrine, inserted the usual reference to the probable futility of those remedies.

> "[S]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. *Houghton v. Shafer*, . . . There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. *Although the probable futility of such administrative appeals was noted, we held that in 'any event, resort to these remedies is unnecessary'.*" *Wilwording, supra*, at pp. 251-252. [Emphasis supplied.]

Although in *Wilwording* the remedies requiring exhaustion appear to have been state court remedies, this Court in quoting from *Marino v. Ragen*, 332 U.S. 561, 568 (1947), stated:

> " 'The exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of * * * separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the [alternatives] is appropriate or effective'." *Wilwording, supra*, at p. 250.

Chief Justice Burger, in his dissent, admonished the majority that summary reversal in this case was inappropriate and further stated that "The Court assumes without citation of authority that further resort to state remedies would be futile; the District Judge, far more familiar than we with the local

situation, thought otherwise." *Wilwording, supra,* at p. 253.

In *Carter v. Stanton,* 405 U.S. 669 (1972) the issue to be determined was the constitutionality of an Indiana welfare regulation. This regulation required an individual seeking public assistance due to the unavailability of the spouse to wait six months prior to receiving benefits. Without exhausting an administrative remedy, suit was brought and a three-judge court dismissed the complaint holding that no substantial federal question had been presented to them and that they therefore lacked jurisdiction. This Court held under the authority of *Damico,* that this was ". . . an indistinguishable case, likewise establish[ing] that exhaustion is not required in circumstances such as those presented here." *Carter, supra,* at p. 671. It is clear that as in *Damico,* where the constitutionality of a statute was the primary issue, this Court felt that the administrative remedy was inadequate. See *Pfeifer, supra,* at p. 576.

3. *Synthesis Of These Holdings*

While the net result of *Monroe, McNeese, Damico, King, Houghton, Wilwording,* and *Carter* is that exhaustion of state court remedies is not required, this conclusion is not surprising. It has always been thought that exhaustion of *judicial* remedies was not required under § 1983. See *Pfeifer, supra,* at p. 571. To say, however, that this Court never intented to require exhaustion of administrative remedies in § 1983 cases would be the say that the numerous references in the opinions and dissents as to the futility of the administrative remedies are mere surplusage.

> "Thus while some of the language of the decisions in *Damico, Houghton* and *Wilwording* seems to suggest that state administrative remedies never need be exhausted before § 1983 complaints can be litigated in a federal district court, their holdings are far more limited. The main holding of these decisions is that state *court* remedies need not be exhausted. It was that holding which the Second Circuit felt obliged to follow in *Rodriguez v. McGinnis,* 456 F.2d 79 (2d Cir. 1972). Where *administrative* remedies have been involved, a requirement of their use has been rejected in narrow circumstances: where the constitutionality of a regulation is challenged, *Damico v. California, supra;* where the administrator alone cannot remedy the grievance, *McNeese v. Board of Education, supra;* and where resort to the administrative remedy is futile, *Houghton v. Shafer, supra.*
>
> Indeed the Court itself has viewed *Damico* and *McNeese* as dispensing with exhaustion requirements when the constitutional claim presented is 'substantial.' *King v. Smith,* 392 U.S. 309, 312, n. 4, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). *See also Askew v. Hargrave,* 401 U.S. 476, 478, 91 S. Ct. 856, 28 L. Ed. 2d 196 (1971). *No decision of the Supreme Court squarely holds that the complaint of a state prisoner, which, if well-founded, is capable of prompt and complete redress by an administrative official can be brought directly into a federal district court under § 1983 without any attempt at exhaustion of administrative remedies. I am reluctant to believe the law is otherwise, at least until dismissal for failure to exhaust that type of administrative remedy is held to be improper."* *Kochie, supra,* at pp. 959-960.[22] [Emphasis supplied].

[22] The line of cases from *Monroe* through *Carter* have been extensively discussed by the courts. Many of the courts which have held exhaustion to be a viable jurisdictional prerequisite to § 1983 cases have indicated that *Monroe,* et al., dealt with situations without adequate state administrative remedies.

> "A reading of these cases indicates that in *Monroe* and in *McNeese* the available state administrative remedies

4. *Preiser v. Rodriguez: A New Departure*

Although the issue of exhaustion of adequate administrative remedies may appear to have been foreclosed *by Wilwording* and *Carter, Preiser v. Rodriguez*, 411 U.S. 475 (1973) reopened the door. As noted by the District Court, in *McCray*, the summary treatment of the difficult question of administrative exhaustion by this Court led to eight separate opinions in *Rodriguez v. McGinnis*, 456 F.2d 79 (2d Cir. 1972), which involved a § 1983 action against prison officials for loss of good time accrued while incarcerated in the New York prison system. *McCray, supra*, at p. 1197 (App. 9a-11a). On

---

were not, as a practical matter, bona fide useful remedies which could afford actual relief to the plaintiff in either of those cases. Both of these cases were further complicated by a factual basis strongly suggestive of racial discrimination which, of course, is not involved herein. *Houghton* clearly involved a situation where the state remedy was inadequate and illusory. *Damico* simply restated *Monroe* and *McNeese* without discussion or analysis." *Armsden v. Cataldo*, 315 F. Supp. 129, 131 (D. Mass. 1970).

In *Egner, supra*, the Court stated that the party seeking dismissal in those cases failed to demonstrate the adequacy and availability of state remedies. "The failure of the defendants to meet this burden in *Monroe* was clearly implied by the paragraph of that opinion in which the troublesome 'supplementary' language appears. 365 U.S. at 183." *Egner, supra*, at p. 937.

> "The failure of the defendants to demonstrate the adequacy and availability of state remedies is a unifying theme of such cases as *Houghton v. Shafer* . . . dealing with the application of prison rules, *Damico v. California* . . . involving welfare eligibility, and *McNeese v. Board of Education* . . . concerning racial segregation in public schools. In *Houghton* and *McNeese*, the Court either expressly or by clear implication found the state remedy to be inadequate. *Damico* involved welfare, an essentially federal subject matter." *Egner, supra*, at p. 928, citations omitted. See also *Hayes v. Cape Henlopen School District, supra*, at p. 830.



appeal, this Court held that when a state prisoner challenges the fact or duration of his physical confinement and requests immediate or more speedy release, his sole remedy is habeas corpus. *Preiser, supra*, at p. 499. Although this Court relied on *Monroe* and its progeny for the proposition that a civil rights plaintiff need not seek redress in a state forum, there was, in reality, no discussion of the question of exhaustion of available state administrative remedies pursuant to § 1983 nor was this Court presented with an adequate administrative remedy. *Preiser, supra*, at pp. 477-79. *See also McCray, supra*, at p. 1198 (App. 11a-13a). This Court discussed in *Preiser* the traditional role of habeas corpus and the strong policy considerations of federal-state comity which mandated its decision in *Preiser* to require exhaustion.

> "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. *What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.* Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. *Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative*

*bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances.* In New York, for example, state judges sit on a regular basis at all but one of the State's correctional facilities, and thus inmates may present their grievances to a court at the place of their confinement, where the relevant records are available and where potential witnesses are located. The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser, supra,* at pp. 491-92 [Emphasis supplied.] *See also McCray, supra,* at p. 1198 (App. 11a-13a).

It is Petitioners' position that *Monroe* and its progeny held that exhaustion of State judicial and inadequate administrative remedies was not required by a state prisioner under §1983. *Preiser* has indicated, however, that if responsible States develop responsible programs such as that presented before this Court today, exhaustion of these programs would be required.[23]

## II.

### EXCEPTIONS RECOGNIZED BY FEDERAL COURTS TO THE PRINCIPLE THAT EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES IS NOT REQUIRED IN AN ACTION PURSUANT TO § 1983 INDICATE THAT A SIMILAR EXCEPTION SHOULD APPLY IN THIS CASE.

There are two main areas in civil rights litigation under § 1983 where the current case law requires exhaustion: (1) where the injury is prospective; (2) and

[23] See also, *Sullivan, supra,* at p. 547; 2 Hofstra L. Rev. at p. 356 and *Davis, supra,* at p. 1394.



where the case is properly brought under another statute.[24]

### A. Prospective Injury

In *Toney v. Reagan,* 467 F.2d 953 (9th Cir. 1972), probationary teachers were notified in November, 1970 that their employment would be terminated as of the fall of 1971. The teachers filed state administrative grievances in December, 1970 and in January, 1971, filed their action in District Court. The United States Court of Appeals for the Ninth Circuit, while citing the general rule that exhaustion is not required in a § 1983 action, and that the same was supplementary citing *Monroe,* held, however:

> "Indeed, if the administrative remedy designed to forestall the threatened discharge was 'adequate', then 'refusal to make use of it constituted an acceptance of the discharge and prevents [appellants] from establishing a claim under the Civil Rights Act.'" *Toney, supra,* at p. 957.

*See also Whitner v. Davis,* 410 F.2d 24 (9th Cir. 1969). Further, citing *Monroe* and its progeny, that court held

[24] *Pfeifer* has indicated his current conclusions derived from *Monroe* and the subsequent cases which followed it. They are that exhaustion will not be required where: (1) the administrative remedy is inadequate; (2) a statute is attacked on its face as unconstitutional or if a constitutional right is involved; (3) where the only administrative remedy is of a judicial nature; or (4) the agency is unconstitutionally constituted.

He further states that exhaustion will probably be required when: (1) the plaintiff is threatened with only a prospective or future deprivation of rights by a proper agency; (2) the claim could have been brought under another statute which shows an intent on the part of Congress to require exhaustion; and that (3) ". . . some courts will shun any hard and fast rules and will adopt a pattern of flexibility in applying the exhaustion doctrine." *Pfeifer, supra,* at pp. 584-85.

that ". . . prospective, as distinguished from retrospective, state administrative remedies must be exhausted in order to state a claim upon which relief can be granted under the Civil Rights Act." *Toney, supra,* at p. 956. *Toney* also discussed the fact that the grievance procedures in that case would not operate to rectify a wrong which had already occurred, but was a method of ". . . forestalling a threatened deprivation of rights which was not to transpire for several months." *Toney, supra,* at p. 956. Similar expressions in cases of employment of teachers indicate that exhaustion of administrative remedies might be required prior to filing a § 1983 action. See *Horton v. Orange,* 464 F.2d 536 (4th Cir. 1972); *Barker v. Hardway,* 399 F.2d 638 (4th Cir. 1968); *Acanfora v. Board of Education,* 491 F.2d 498 (4th Cir. 1974), *cert. denied* 419 U.S. 836 (1974);[25] and *Mondell v. Mayor & City Council,* 356 F. Supp. 76 (D. Md. 1973).

Similarly, in *Pope v. State Bar of Texas,* 480 F.2d 998, 1003 (5th Cir. 1973), the Court of Appeals for the Fifth Circuit required exhaustion when the state administra-

[25] In *Acanfora, supra,* at p. 503 the Fourth Circuit stated that, "[W]e do not, however, approve of the parties' failure to use administrative remedies to resolve their differences. An effective grievance procedure might have eliminated this expensive, protracted litigation." Similarly, in *Mondell, supra,* Judge Frank A. Kaufman, in approving the parties' use of the grievance procedures, stated that ". . . there is a substantial practical reason for this Court to postpone hearing Mondell's claims for reinstatement, back pay and damages until she has received her hearing before the Commission and has learned that body's decision. Although the issues of reinstatement and back pay will not necessarily be resolved by the Commission, the facts found by the Commission and the testimony adduced before it may well be relevant and material in this case if this Court subsequently is required to decide Mondell's First Amendment claims seeking reinstatement, back pay and damages." *Mondell, supra,* at pp. 78-79.



tive remedies were adequate in order to assure that a § 1983 action was ripe for adjudication or that the decision of the institutional authority was final so that the same is ripe for adjudication. *See Stevenson v. Board of Education,* 426 F.2d 1154, 1157 (5th Cir. 1970), cert. denied 400 U.S. 957 (1970). In *Raper v. Lucey,* 488 F.2d 748 (1st Cir. 1973), an applicant for a motor vehicle operator's license in Massachusetts filed suit pursuant to § 1983 to correct alleged deficiencies in the Massachusetts administrative procedures governing motor vehicle license applications. While adhering to the principle that exhaustion is not required in § 1983 cases, the court acknowledged that certain of their recent cases regarding school administration would seem to be out of step with *Monroe* and its progeny and stated:

> "To the extent that they indicate a general or automatic requirement of administrative exhaustion in § 1983 cases, we note our disapproval and signal our acceptance of the earlier cited line of cases. But we adhere to our view of the necessity for ripeness to the extent that there must be at least some definitive administrative or institutional determination before a § 1983 action may arise. We subscribe to the view expressed in *Stevenson v. Board of Education,* . . . that we should not 'intervene in school personnel and management problems without requiring such prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institution in the sense that it is ripe for adjudication.'" *Raper, supra,* at p. 751.

*United Automobile, Aerospace, & Agr. Imp. Wkrs. of Am. v. State Farm Insurance Co.,* 350 F. Supp. 522 (N.D. Ill. 1972), involved a civil rights action against an insurance rating board pursuant to § 1983 alleging discrimination in the setting of insurance rates. The district court in that case concluded that plaintiffs

would not be entitled to relief until they had exhausted their state administrative remedies under the Illinois Insurance Code. After an extensive review of *Monroe*, the court stated:

> "Where a plaintiff (1) is not challenging the constitutionality of a statute on its face, (2) can challenge the complained of activity in a state proceeding on a basis different in nature than his basis in a federal court, and (3) has adequate administrative, not judicial, remedies available, he will be required to exhaust his state remedies before proceeding in a federal court." *U.A.W., supra*, at p. 527.

Although *U.A.W., supra*, relied on *Metcalf v. Swank*, 444 F.2d 1353 (7th Cir. 1971) which was subsequently reversed and remanded by this Court in light of *Carter v. Stanton*, 405 U.S. 669 (1972), the opinion of this Court in *Carter, supra*, relied on *Damico, supra*, "an indistinguishable case" which "establishes that exhaustion is not required in circumstances such as those presented here. Cf. *McNeese v. Board of Education*, . . .; *Monroe v. Pape*, . . ." *Carter, supra*, 405 U.S. at p. 671. Thus the general principles cited by the court in *U.A.W.* that there are certain cases which may require exhaustion before a § 1983 action is brought in federal court is still viable.

*Gibson v. Berryhill*, 411 U.S. 564 (1973) involved a suit by licensed optometrists who sought an injunction under § 1983 to stop hearings before the Alabama Board of Optometry who had charged those optometrists with unprofessional conduct.

This Court held that the plaintiffs in *Gibson* were not required to exhaust state administrative remedies as they found on the record that the same ". . . was so defective and inadequate as to deprive the plaintiffs of



due process of law." *Gibson, supra*, at p. 570. While adhering to the general rule that state administrative remedies need not be exhausted under § 1983, this Court stated:

> "*Whether this is invariable the case even where*, as here, a license revocation proceeding has been brought by the state and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, *is a question we need not now decide*; for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. *Thus, the question of the adequacy of the administrative remedy, an issue which under federal law the district court was required to decide, was for all practical purposes identical with the merits of appellees' law suit.*" *Gibson, supra*, at pp. 574-75. (Footnotes omitted.) [Emphasis supplied.]

Finally, Justice Marshall, with whom Justice Brennan joined, wrote a short concurring opinion where he said that he joined in the opinion of the Court ". . . except insofar as it suggests that the question remains open whether plaintiffs in some suits brought under 42 U.S.C. § 1983 may have to exhaust administrative remedies." *Gibson, supra*, at p. 581.

Although the Inmate Grievance Commission is, in essence, a "retrospective" as opposed to "prospective" remedy, it has the latter capability as its jurisdiction ". . . mirrors the traditional areas of §1983 jurisdiction in prisoner cases." *McCray, supra*, at pp. 1202, 1208. (App. 19a-20a, 30a-32a).[26]

---

[26] While *Gibson* has been severely limited by decisions and its commentators to instances of prospective injury or situations where the individuals right's are protected during

## B. Other Exceptions

As *Pfeifer* notes, there appears to be a trend toward requiring exhaustion of adequate state administrative remedies when a civil rights plaintiff should have brought his action under another statute which would show an intent on the part of Congress that exhaustion is to be required as in *Preiser, supra*. See *Pfeiffer, supra*, at p. 580 (Pfeifer's comments regarding the use by some of the District Courts of flexibility in applying the exhaustion doctrine are collected in his Comments at p. 585.)

Further support may be found for exhaustion of effective and adequate state administrative remedies in

---

the state administrative process, it still involves the same rationale as the cases from *Monroe* to *Carter*, that is, inadequate state administrative remedies. See *McCormack, supra*, at p. 541; *Pfeifer, supra*, at p. 581; and *Sullivan, supra*, at pp. 538, 547.

In *Brooks v. Center Township*, 485 F.2d 383 (7th Cir. 1973), plaintiffs alleged that defendants unconstitutionally stopped welfare and food payments. The complaint was dismissed for failure to exhaust, but on appeal the Seventh Circuit held that the complaint should not have been dismissed for failure to exhaust but indicated a qualification on the non-exhaustion doctrine under *Gibson, supra*.

> "The court however qualified that statement by saying it need not decide '[w]hether this is invariably the case.' In a factual situation such as the one there, where the state remedy was initiated and pending and the individual would be deprvied of nothing until completion of the state proceeding, the question of exhaustion 'remains open.' *Gibson* is inapposite here because no Indiana state proceeding was or is pending with which a district court decision would interfere." *Brooks, supra* at p. 386.

In *Gibson, supra*, this Honorable Court in note 14 stated that "state administrative remedies have been deemed inadequate by federal courts and hence not subject to the exhaustion requirement, on a variety of grounds." *Gibson, supra* at p. 575. The reasons discussed included delay or bias by the administrative agency or that the administrative agency was not empowered to grant effective relief. *Cf. McNeese, supra*.



certain requirements that plaintiffs in federal actions claiming relief similar to that claimed under § 1983 are required to exhaust any adequate federal administrative remedies.

The District Court stated that ". . . to require state prisoners to exhaust such an administrative remedy does not hold them to a stricter standard of exhaustion than other civil rights petitioners, as *Wilwording* seems to suggest." *McCray, supra*, at p. 1200 (App. 16a). It is obvious that the District Court did not rely principally on federal exhaustion, but used it to indicate the anomaly existing under § 1983, an Act passed in 1871 to correct unchecked lawlessness. See *Monroe*, and the dissenting opinion in *Preiser*.

The District Court indicated that *McGaw v. Farrow*, 472 F.2d 952 (4th Cir. 1973) required soldiers of the United States Army stationed in Virginia to exhaust administrative remedies provided by the military prior to filing an action in the District Court for alleged violations of constitutional rights. In *McGaw, supra*, it was alleged that plaintiffs had been denied constitutional rights when the base commander refused to permit them to use the chapel for a special service. The Fourth Circuit held that as military procedures provided a method of appeal, plaintiffs in that case were required to exhaust that administrative remedy. *McGaw, supra*, at p. 958.[27]

*Kochie v. Norton, supra*, was a suit by a federal prisoner against the Warden of the Federal Correctional

---

[27] Similar cases holding that exhaustion of administrative remedies are required in this situation are *United States ex rel. Taylor v. Fritz*, 446 F.2d 36, 37 (8th Cir. 1971); *Gonzales Salcedo v. Lauer*, 430 F.2d 1282, 1283 (9th Cir. 1970); *Karpinski v. Resor*, 419 F.2d 531, 532 (3rd Cir. 1969); *United States ex rel. Berry v. Commanding General*, 411 F.2d 822, 824 (5th Cir. 1969); and *Sohm v. Fowler*, 124 U.S. App. D.C. 382, 365 F.2d 915, 917 (1966).

Institution at Danbury, Connecticut, alleging constitutional deprivations in the nature of civil rights violations. After reviewing the applicable decisions, that court held that a federal prisoner must exhaust his administrative remedies, even though the grievance procedure was rudimentary. *Kochie, supra*, at p. 961. It is interesting to note, however, that Judge Newman in *Kochie, supra*, at p. 960, further stated that his comments were ". . . not to suggest that requiring exhaustion of administrative remedies should be an unyielding principle. Consideration should always be given to the gravity of the matter complained of and the realistic availability of a prompt and effective administrative remedy." It is clear that Judge Newman premised his decision and his discussion of § 1983 actions on the availability of an adequate and effective administrative remedy. In both cases, he would hold that exhaustion would be required.

The District Court, in *McCray* in discussing the requirement of exhaustion by military personnel, stated that there was a need to protect against violations of constitutional rights whether the defendant was in the Army, a state prisoner or, as Judge Newman stated, a federal prisoner.

> "Thus, if a defendant is required to exhaust administrative remedies for an alleged violation of his rights by an agency of the federal government when the only available judicial forum is the federal court system, it would seem inconsistent not to require such exhaustion when the deprivation is under color of state law." *McCray, supra*, at pp. 1200-1201 (App 15a-19a).

Chief Judge Northrop further noted that employment discrimination cases under Title VII of the Civil Rights Act and the Age Discrimination Act require exhaustion



of administrative remedies and stated that although Congress specifically provided for exhaustion in those cases, the rationale under § 1983 was no less compelling. Further, Chief Judge Northrop stated that while the codification of 28 U.S.C. § 2254 in 1948 required exhaustion in habeas corpus cases this Court had previously required exhaustion by judicial decision. *Ex parte Royall*, 177 U.S. 254 (1886) and *Ex parte Hawk*, 321 U.S. 114 (1944). *McCray, supra*, at p. 1201 (App. 17a).[28]

## III.

### SOUND AND OVERRIDING POLICY REASONS REQUIRE EXHAUSTION OF MARYLAND'S EFFECTIVE AND ADEQUATE STATE ADMINISTRATIVE REMEDIES PURSUANT TO § 1983 UNDER THE CIRCUMSTANCES OF THIS CASE.

A reevaluation should be undertaken of this Court's pronouncements regarding non-exhaustion in § 1983 prisoner petitions as changed circumstances require changed approaches. The requirement of exhaustion rule has been liberalized in recent years, apparently due to a feeling that the states would not adequately protect those rights guaranteed to its citizens by federal constitutional and statutory provisions. Justice Brennan, in a footnote in his dissenting opinion in *Gibson, supra*, quoted from the remarks of Representative Coburn, Cong. Globe, 42d

---

[28] In *Cravatt, et al. v. Thomas, et al.*, 399 F. Supp. 956 (W.D. Wisc. 1975), that court was faced with prisoner petitions pursuant to 28 U.S.C. 2255 filed by federal prisoners alleging certain claims in the nature of deprivations occurring in the federal prison similar to those deprivations alleged under Section 1983 by state prisoners. The Court in that case held that while exhaustion may be required as to the conditions of confinement, he found the grievance system employed by the Federal Bureau of Prisons in these cases to be defective and did not require exhaustion on certain of the issues.

Cong. 1st Sess. 460 (1871), to the effect that the federal courts would be the forum of choice to enforce § 1983 because they were ". . . above mere local influence; . . . their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood." *Gibson, supra,* at p. 514. See also *Pfeifer, supra,* at p. 579. Petitioners herein submit that this philosophy, which has been increasingly prevalent during the last decade, overlooks reality. *McCormack* notes that the authorities are replete with statements that the states should be the primary guarantors of constitutional rights and that some states are doing so but only as a matter of state law. *See McCormack, supra,* at p. 532; *H. Hart and H. Wechsler, the Federal Courts and the Federal System,* 330, 359 (2d Ed. 1973); *Wilkes, The New Federalism in Criminal Procedure—State Court Evasion of the Burger Court,* 62 Ky. L. J. 421 (1974). In *Wright v. Maryland Penitentiary,* 429 F.2d 1101 (4th Cir. 1970), the Fourth Circuit stated that Maryland's court decisions clearly show willingness to adjust state law to conform with contemporary constitutional decisions and that Maryland is sensitive to the constitutional right of state prisoners. *Wright, supra,* at pp. 1105-06.

The unique situation created by the Maryland Inmate Grievance Commission represents a responsive state remedy to the problem represented by prisoner § 1983 actions. *See Hayes, supra,* 455 F.2d at p. 800. The necessity for such a reevaluation is even more compelling because of the substantial burden on the courts and because *Monroe,* which supplied the impetus to § 1983 actions, is of relatively recent vintage (See the comments in *Preiser, supra,* at pp. 491-93.)



The Fourth Circuit recognized that as each of the cases presented the same question of exceptional importance, they were consolidated and heard en banc. *McCray, supra,* 516 F.2d at pp. 359-60 (App. 74a). While acknowledging that the District Court in *Washington v. Boslow, supra,* had found the Inmate Grievance Commission Act a fair and adequate remedy, notwithstanding the inability of the Commission to award money damages, the Fourth Circuit held that, under the law, it could not require exhaustion.

> "We keenly appreciate the force of the factors identified by the district court in *McCray* and *Washington* as supporting a policy determination that exhaustion of available administrative remedies should be required of prisoners of correctional institutions in Maryland as a prerequisite to a suit under § 1983. We recognize the burden which the increasing flood of prisoner complaint litigation places upon the already over-taxed district courts as well as ourselves. Nevertheless, we are constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon the exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification of its controlling adjudications on the subject. Congress has not enacted such legislation. The Supreme Court has not yet begun a re-examination of its previous holdings and we have no basis on which to predict that it will, or, if so, with what result. We think that we have no alternative but to hold that exhaustion may not be required." *McCray, supra,* 516 F.2d at pp. 360-61 (App. 75a-76a).

The Fourth Circuit further stated that ". . . it is inappropriate to consider the policy considerations which might dictate a different course of decision. They must be addressed to the Supreme Court, which alone can overrule its prior decisions, or to the Congress, which has

authority to amend the statute. Our duty is clear: We must follow the Supreme Court, not attempt to lead it. We must hold that exhaustion is not required." *McCray, supra,* 516 F.2d at p. 365 (App. 83a). Circuit Judge Field, in his separate opinion, in which Judge Russell joined and in which Judge Widener concurred, felt that he too had no alternative but to hold that exhaustion could not be required in a civil rights action. 415 F.2d at p. 372 (App. 97a-98a). Judge Widener, in his separate opinion, in which Judge Russell joined, while concurring in the result of the majority solely because of Part II of *Wilwording, supra,* stated that:

> "There is assuredly no policy reason for the courts not to apply the customary and general law of requiring exhaustion of administrative remedies merely because a case is brought under 42 U.S.C. § 1983 . . . . Since no policy reason exists against exhaustion in protecting the liberty interest as shown by the decisions of the Supreme Court, I can find no policy interest which exists against an exhaustion requirement respecting conditions of confinement. If exhaustion is required to test the legality of the fact of confinement, what policy should require non-exhaustion when testing the conditions of confinement?
>
> "It follows that I would affirm other than on account of that part of Part II of *Wilwording* which has not been modified." 516 F.2d at p. 377 (App. 107a).

The doctrine of non-exhaustion in a § 1983 action is a judicially created requirement which, if circumstances change, should also be adaptable. The District Court noted:

> "There is need to reconsider the applicability of the exhaustion rule with respect to § 1983 actions when there is an available and adequate state administrative remedy. This is evident when one reads the eight



separate opinions issued by the *en banc* panel of the second circuit in the *Rodriguez* case which reflect a vast disagreement in interpreting the line of cases from *Monroe* to *Wilwording*. In addition to resolving a conflict in interpretation, a reconsideration is necessary to eliminate the contradiction created by the Supreme Court in its analysis of the exhaustion rule in the context of habeas corpus in *Preiser v. Rodriguez, supra*. In that case, the court justified the application of the exhaustion rule in habeas corpus by invoking the concept of federal-state comity, while ignoring that it should be no less a consideration in prisoner § 1983 actions. To resolve these problems one must examine the '[v]arying views as to the breadth of the *Wilwording* holding, the strength of the prior precedents, the proper character of the federal balance, and the potential impact upon judicial administration.' It is therefore imperative that this court consider the validity of these factors and determine under what circumstances, if any, a requirement of exhaustion under § 1983 would be permissible." *McCray, supra,* at p. 1199 (App. 13a-15a) (Footnotes omitted.)

It is abundantly clear that the principal reason behind the decision in *Monroe, supra,* was the nature of the factual situation in that case. "Few reported cases have presented all of the manifold aggravating circumstances which petitioners here allege. . . ." *Monroe, supra,* at p. 210, dissenting opinion of Justice Frankfurter. Further, Justice Frankfurter stated:

> "While we may well decline to re-examine recent cases which derive from the judicial process exercised under its adequate safeguards — documenting briefs and adequate argument on both sides as foundation for due deliberation — the relevant demands of *stare decisis* do not preclude considering, for the first time thoroughly and in the light of the best available evidence of congressional purpose, *a statutory interpretation which started as an unexa-*

*mined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration.* Particularly is this so when the interpretation, only recently made, was at its inception a silent reversal of the judicial history of the Civil Rights Act for three quarters of a century. . . .

"*But the Court had not always declined to re-examine cases whose outcome Congress might have changed. . . .*

"And with regard to the Civil Rights Act there are reasons of particular urgency which authorized the Court — indeed, which make it the Court's responsibility — to re-appraise in the hitherto skimpily considered context of R.S. § 1979 [now 42 U.S.C. 1983] what was decided in *Classis, Screws and Williams.* This is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision. . . . Nor is it merely a mine-run statutory question involving a narrow compass of individual rights and duties. The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States and the critically important sphere of municipal law administration. . . . 'We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. *But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable. . . .*'" *Monroe, supra,* at pp. 220-222. [Emphasis supplied.]

The District Court recognized the implication of Justice Frankfurter's remarks in *Monroe* that it appeared ineffectual to protect "human liberties by torturing an 1871 statute [42 U.S.C. § 1983] to meet the problems of 1960." *Monroe, supra* at p. 244.



The raison d'etre of § 1983 was to provide a remedy where state law was unfair, inadequate, or where state officials failed to enforce their own laws.

> "The impetus for the enactment of the Ku Klux Act was President Grant's message to Congress asserting that a condition then existed in some States which rendered life and property insecure and which was beyond the power of state authorities to control. . . . Throughout the debates on the bill the note was repeated: there was a need for federal action to supplant state administration which was failing to provide effective protection for private rights. . . . Constitutional authority for such federal action was sought in a logic that 'States' were ordered by the Fourteenth Amendment not to 'deny' equal protection of the law; that a 'state' in effect denied such protections not only when its legislation was on its face unequal, but whenever its judicial or executive authorities by a consistent course of practice, 'permanently and as a rule' refused to enforce its laws for the protection of some class of persons. . . . Wrongs susceptible of adequate redress before the state courts evidently did not concern Congress, and Congress in 1871 did not attempt to reach those wrongs." *Monroe, supra* at p. 230, Fn. 46.

### A. The Abuse Of 42 U.S.C. § 1983 Establishes The Need For Exhaustion Of Maryland's Remedy

Although much may be made from the argument that even without an exhaustion requirement, prison inmates will still voluntarily avail themselves of the administrative procedures, it is certainly a naive view of the realities of prison life. *See Wolff v. McDonald,* 418 U.S. 539, 94 S. Ct. 2963 (1974). Without an exhaustion requirement, however, state prisoners undoubtedly will continue to file more and more § 1983 actions for the

tangential benefits they provide.[29] Chief Judge Northrop has further commented:

> "A potential abuse of the right to bring action in federal court under § 1983 has thus been realized, with two adverse results. First, the case load of all the judges has increased tremendously, causing a rising backlog of cases. Secondly, and more importantly, the length of time that elapses from the date a prisoner files a meritorious claim asserting an infrigement of his constitutionally protected rights to the date of disposition, has become so great that often neither equitable nor legal relief are effective in protecting his rights. This latter consequence is due in part to the ever-increasing case load of the courts, and to some extent is a normal reaction to prisoners who have 'cried wolf' many times too often. These factors cause the great concern, and a brief analysis of the magitude of the problem is warranted." *McCray, supra*, at p. 1195 (App. 5a-6a).

This Court has also indicated that § 1983 actions are subject to abuse and indicated the need to reevaluate the non-exhaustion policy and the necessity for alterna-

---

[29] Prisoner complaints to state courts regarding conditions of confinement declined approximately 66% after the Commission began operation in 1971. During fiscal 1972, 78 civil rights complaints were filed in the United States District Court for the District of Maryland. These filings rose 41% to 110 cases in fiscal 1973 prior to the decision of the District Court in October, 1973 in *McCray, supra*. For fiscal 1974, subsequent to *McCray, supra*, civil rights filings fell 26% while the population of the correctional facilities rose 11.5%. *Ombudsman/Grievance Mechanism Profiles — No. 3, supra*, at pp. 10-11. The Fourth Circuit reversed the District Court on April 10, 1975. *McCray, supra*, 516 F.2d at p. 357. During the period of May through October, 1974, 84 civil rights cases were filed in the District of Maryland. This number rose to 103 cases for the same period, that is, May through October, 1975.



tives. In *Procunier v. Martinez*, ___ U.S. ___, 94 S. Ct. 1800 (1974), Justice Powell stated:

> "They [the Federal Courts] are also ill-suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints. Moreover, the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints. As one means of alleviating this problem, THE CHIEF JUSTICE has suggested that federal and state authorities explore the possibility of instituting internal administrative procedures for disposition of inmate grievances. 59 A.B.A.J. 1125, 1128 (1973). At the Third Circuit Judicial Conference meeting of October 15, 1973, at which the problem was addressed, suggestions also included (i) abstention where appropriate to avoid needless consideration of federal constitutional issues; and (ii) the use of federal magistrates who could be sent into penal institutions to conduct hearings and make findings of fact. We emphasize that we express no view as to the merit or validity of any particular proposal, but we do think it appropriate to indicate the necessity of prompt and thoughful consideration by responsible federal and state authorities of this worsening situation." Procunier, *supra*, ___ U.S. ___, 94 S. Ct. at p. 1807, Fn. 9.

### B. BENEFITS TO BE GAINED FROM EXHAUSTION

As Sullivan notes, the requirement for exhaustion was the result of two fundamental principles: "(1) that questions should be decided by those most competent to do so, and (2) that questions should be decided in an orderly way." Sullivan *supra* at p. 538 Fn. 9. In *Parisi v. Davidson*, 405 U.S. 34, 37 (1972), this Court noted that "[the] basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence — to make a factual

record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Pfeifer posits that requiring exhaustion of adequate administrative remedies is necessary: (1) to avoid friction when state remedies are by-passed, which reflects the federal court's recognition that the state has an interest in a comprehensive scheme of regulation and in not having that scheme by-passed; (2) to avoid strained relations with other agencies of government; (3) to promote efficiency as cases may be resolved during the administrative process; to allow an individual to pursue a more flexible and less time-consuming and expensive remedy and to provide a record and factual background; (4) to allow the administrative agency to exercise its expertise which might be lacking in the court; (5) that an agency will decide, thus creating an incentive to State administrative agencies which would be absent if their procedures were easily by-passed; and (6) to assure the courts of finality in the cases which reach them for decision. Pfeifer, *supra* at pp. 566-68. Chief Judge Northrop found that the Maryland Inmate Grievance Commission was staffed by persons knowledgeable in the field, provided an effective and adequate remedy, and clearly served all of the traditional requirements of exhaustion. *See* generally *McCray, supra*; and *McCray, supra*, 516 F.2d (separate opinion of Judge Widener).

> "However, if there is available a viable administrative remedy, then the spurious claims will be weeded out, and the district courts will be called upon to hear only those cases that are clearly of constitutional dimension. In addition, the federal district courts will have the benefit of a complete record of the administrative proceedings before the Inmate Grievance Commission, and the appeals to the state courts. Finally, when an infringement of a prisoner's rights is found, but equitable relief can be more effectively enforced by the State, this Court will be able to remand a case to the State. Under this procedure a much better record will be available to the court, the constitutional issues presented by the complaint will be definitely articulated, and the Court will not be bound to act as an advocate for the plaintiff to determine what constitutional grievances he might have." *McCray, supra*, at p. 1201 (App. 17a-19a). *See also Mondell, supra*, at pp. 78-79.



### C. Alternative Proposed Approaches

#### 1. *Deferral*

In 82 Harv. L. Rev., the Note proposed that in lieu of wide federal jurisdiction without an exhaustion requirement, "there should be a system of jurisdictionally based deferral to all adequate state remedies in cases not meeting any of the standards based on the three *Monroe* purposes and the class deprivation concern." 82 Harv. L. Rev. at p. 1501.[30] "The cases subject to dismissal for federal courts under the deferral approach would be those of individual deprivations when state remedies are adequate in theory and practice and no state law is challenged as denying a federally secured right. This description sounds heavily qualified; but included are categories of minor cases accounting for significant amounts of section 1983 litigation, such as many police torts, prisoners' rights cases, and probation and parole complaints." Id. at p. 1502 (footnotes

[30] The author indicates that exhaustion is based on the court's declining in its equitable discretion jurisdiction which has been properly invoked; deferral, however, would be based on an interpretation of Section 1983 "viewing dismissal as required by lack of jurisdiction. Deferral thus is equally a possibility with respect to actions at law and suits in equity. The exhaustion requirement has also been limited to cases in which the relevant state remedy was administrative; deferral would eliminate the distinction between administrative and judicial state remedies." 82 Harv. L. Rev. at pp. 1498-99.

omitted). The Note concludes that because of the substantial state interests involved, deferral to adequate state remedies should be imposed under § 1983. Id. at pp. 1510-11. *See also* Pfeifer, *supra*, at p. 566, n. 7.[31]

2. *Full Exhaustion*

Judge Ruggero J. Aldisert, in his article, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Case Load*, Law and Social Order, 1973: 557, has advocated full exhaustion of adequate state administrative remedies in all prisoner cases; limited relitigation of certain issues in federal courts and adoption of the Freund Committee's recommendations that an administrative agency process prisoners' complaints.[32] Aldisert, *supra* at pp. 575-77. *See also* McCormick, *supra* at pp. 533-35.

[31] An offshoot of the various proposals for exhaustion of adequate state administrative remedies is where a statute is attacked on its face as denying a right; in that instance, there would be no need for the application of agency expertise with the development of a factual record. *See Pfeifer, supra*, at p. 568, and *Sullivan, supra*, at pp. 539-40. However, even that suggestion has been subject to certain exceptions. In *Quaker Action Group v. Morton*, 460 F.2d 854 (D.C. Cir. 1971), the court stated that "the governing concept as expressed in both judicial doctrine and statute may require even constitutional claims to be determined on the administrative record when the administrative procedure is fair and adequate for presentation of material facts." *Quaker Action Group, supra*, at p. 861. Similarly, Sullivan proposed that only in those instances where a factual record was totally irrelevant and the statute facially unconstitutional or incapable of any appropriate construction would exhaustion be without value. *Sullivan, supra*.

[32] 57 F.R.D. 573, *supra*.



3. *Administrative Procedure Act*

Another suggestion as an alternative to the exhaustion requirement would be based on Section 704 of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (1970). Sullivan indicates that a modified approach based on Section 704 would "provide immediate protection of fundamental federal rights, guarantee the litigant's choice of a federal forum, and achieve efficient allocation of judicial resources. Using Section 704 as a basic model, the federal courts should require exhaustion of state administrative remedies where: (1) an orderly system of appeals is provided by statute or agency rule; (2) the administrative remedies are adequate; and (3) the system of appeals provides full interim relief by protecting the litigant's rights under Section 1983 until the administrative process has been concluded." Sullivan, *supra* at p. 555. *See* footnote 13, *supra*.

4. *Individual Injury*

In 68 Colum. L. Rev., the authors, discussing exhaustion under § 1983 after examining *Damico, supra*, and the implications from that case, conclude that exhaustion of state administrative remedies should be required only in matters which concern the individual claimant in order to protect the rights of large numbers of individuals who might be deprived of relief if a case involving a substantial question was settled with that individual. 68 Colum. L. Rev. at pp. 1208-09.

D. If The Maryland Inmate Grievance Commission Is To Be Effective, State Prisoners Must Be Required To Exhaust That Remedy Before Bringing An Action Pursuant To §1983.

"[P]rocedures should be tailored to need, not to some abstract standard." Burger, *supra*, 59 A.B.A.J. at p. 1128. While procedures which are constitutionally

deficient or constitutionally impermissible will not save an otherwise meritorious endeavor, Petitioners have amply demonstrated that the Maryland Inmate Grievance Commission is an effective and adequate state remedy which should be exhausted before a state inmate will be permitted to file an action pursuant to 42 U.S.C. § 1983. As Justice Frankfurter stated, this Court "has not always declined to reexamine cases whose outcome Congress might have changed." And experience dictates that with changed circumstances and effective and adequate remedies, one should not "expect to create an effective means of protection for human liberties by torturing an 1871 statute to meet the problems of 1960." *Monroe, supra* at pp. 220-22, 244. "The evils against which the bill [Section 1983] was directed, moreover, substantiate the three main aims listed in *Monroe* without suggesting that a need was felt for a fully supplementary federal remedy." 82 Harv. L. Rev. at p. 1492. The State of Maryland has made a genuine and good-faith effort to protect federal rights in state administrative proceedings. 82 Harv. L. Rev. at p. 1493.

The liberalization of the exhaustion doctrine in § 1983 cases has, according to certain commentators, apparently begun to retreat.

> "Whatever reasons the Supreme Court may have for the startling result are obfuscated through the pretense that the *Damico* result followed from *McNeese* and the pretense that the *McNeese* result followed from *Monroe*. The holdings have been largely in the nature of unreasoned fiats, and the results seem altogether unsatisfactory because they are so clearly contrary to such principles as have heretofore been discernable in exhaustion law." K. Davis, *Administrative Law Treatise*, Sec. 20.01 (1958), at pp. 668-69 (Supp. 1970).



Davis also predicted that the non-exhaustion rule would not endure. K. Davis, *supra*, Sec. 20.09 at p. 699. *See also* Pfeifer, *supra*, at p. 577. Sullivan is also of the opinion that *Preiser, supra*, and certain of the other cases have indicated that the traditional exhaustion doctrine is appropriate in certain instances. Sullivan, *supra* at p. 537. In *Wolff v. McDonnell, supra*, this Court, while not discussing the question of exhaustion in § 1983 cases, did formulate a distinction between due process rights afforded those incarcerated and those in free society. *Wolff, supra*, 418 U.S. ___, 94 S. Ct. at 2977. Judge Widener, in *McCray, supra*, stated:

> "Wolfe[sic] v. McDonnell, 418 U.S. 539 . . . (1974), however, held, rather than recited, that the rights of a state prisoner under § 1983 are not coextensive with those of any other person, and the court stated: 'Of course, as we have indicated, that a prisoner retains rights under the Due Process Clause in no way implies that this right is not subject to restrictions imposed by the nature of the regime to which he has been lawfully committed. . . . (Citations omitted). Prisoner disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. . . . (Citations omitted). In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.' The rule, 418 U.S. at 556 . . . as pointed out in the dissenting opinions, created a separate class for prisoners." *McCray, supra*, 516 F.2d at p. 376 (App. 105a).

In *Huffman v. Pursue*, ___ U.S. ___, 95 S. Ct. 1200 (1975), this Court held that in certain circumstances, an individual would be required to exhaust his state appellate remedies before seeking relief in district court unless he could bring himself within an exception specified in *Younger v. Harris*, 401 U.S. 37 (1971). "The

importance of the ruling [Huffman v. Pursue] is that it shows definitely that the all embracing rule of non-exhaustion in all § 1983 cases is no longer the law, for this, and the holding in *Wolfe* [sic], are direct holdings that, first, prisoners' rights are special cases, and, second, exhaustion may be required in some circumstances although the basis of the suit is under 42 U.S.C. § 1983." *McCray, supra*, 516 F.2d at p. 376 (App. 106a, separate opinion of Judge Widener).

"Although not decided under 42 U.S.C. § 1983, *Schlesinger v. Councilman*, ___ U.S. ___, 95 S. Ct. 1300 . . . (1975), has further eroded the all embracing rule. It held that where a serviceman is charged with crimes by military authorities and could 'show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise.' at ___, 95 S. Ct. at 1313. And the court concluded '. . . we discern nothing that outweighs the strong considerations favoring exhaustion of remedies or that warrants intruding on the integrity of military court processes.' at ___, 95 S. Ct. at 1315. At p. ___, 95 S. Ct. 1300, the court had compared the policy rules of exhaustion in habeas corpus and non-intervention in State criminal proceedings with exhaustion of administrative remedies." *McCray, supra*, 516 F.2d at p. 376 (App. 106a, separate opinion of Judge Widener).

Davis, *supra*, commented, following his discussion of *Preiser, supra*, that the question remained open why there was ". . . no general requirement that adequate internal prison remedies be pursued, if not exhausted." He indicated that access to the district court would still lie but the burden would be the prisoner's to show why he could not obtain extra-judicial satisfaction. "Presumably it would also be in the state's interest to adopt



procedures that accorded fair treatment to prisoners, for in that manner the federal judge would less easily plunder its employees' purses and discretionary authority. If a distinction from other kinds of civil rights cases is necessary to justify this proposal, then surely it lies in the state's special need for physical prison security." Davis, *supra* at p. 1384. Davis also cites the proposals of Judge Friendly which recommended that state prisoner suits be divided into two classes: (1) allegations of constitutional error in the original criminal conviction and all other actions. The other actions would require exhaustion of state administrative remedies. *See* Davis, *supra* at p. 1384, n. 107; and H. Friendly, *Federal Jursidiction: A General View*, 105-07 (1973).

Perhaps, more important, is the fact that the tremendous increase in the number of civil rights complaints filed in federal court not only had "a detrimental impact upon the judicial system and its administration," but that adjudication of legitimate complaints of prisoners whose constitutional rights were being violated was being delayed. *McCray, supra* at pp. 1194, 1201 (App. 3a-5a, 17a-19a).[33]

---

[33] Chief Judge Northrop in his opinion in *McCray, supra*, quoted extensively from the report in 57 F.R.D. 573, *supra*, which referred to the magnitude of the problem of prisoner complaints and the necessity of finding a reasonable alternative. A similar discussion of the need for an alternative remedy to § 1983 actions is found in *Prison Ombudsmen Provide a Safety Valve*, 56 Judicature 314 (March 1973), also discussed by Chief Judge Northrop. The Inmate Grievance Commission ". . . combines the best of both suggestions, that is, initial investigation by a non-judicial institution charged with the responsibility of investigating and assessing prisoner complaints, and provision for subsequent review by the courts." *McCray, supra*, at pp. 1205-1207 (App. 23a-30a).

Subsequently, in *Washington v. Boslow, supra*, the District Court cited the observations of Judge Aldisert:

> "There is also a point of view which first came to me over a cup of coffee from an experienced and sensitive

"What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his

---

federal trial judge, whose record proves he has been concerned with protecting the rights of the state prisoners. In discussing this subject, he admitted an abiding concern that, in his efforts to improve the lot of many prisoners, he was actually producing the opposite effect. The judge commented that he was afraid he had been playing warden, but was not sure that he had succeeded well. He remarked that while he thought he had given the prisoners their constitutional rights, he had also crippled prison discipline. The guards were now scared; what is more, they were demoralized. He observed that guards are now taunted, abused and spat upon, that competent personnel are leaving. As a consequence, many of the prisoners are at the complete mercy of other prisoners— toughs and bullies who are having a field day. In short, the judge was very much afraid that the federal judiciary had made a serious mistake. The courts had given birth to something and now could not put the baby back.

Meanwhile prisoners' petitions continue to inundate the federal courts, pathetic, handwritten grievances; some very real; some rather illusory; some with genuine constitutional issues; some merely stating disagreements with administrative decisions. This litigious flood consumes many judicial manhours and challenges the abilities of federal courts to cope with their own calendars. Mr. Justice Powell's recent statement concerning state habeas corpus in the federal system is equally applicable to prisoners' civil rights claims: 'The current flood of petitions . . . already threatens — because of sheer volume — to submerge meritorious claims and even to produce a judicial insensitivity to . . . petitioners.'

. . .

The Freund Committee met this phenomenon with refreshing candor:

> The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the



neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the states have an important interest in not being by passed in the correction of these problems." *Preiser, supra,* at pp. 491-92. Disputes regarding living conditions, employment opportunities within the institution, property, assaultive fellow inmates, or medical problems do not relate to the validity of the fact or length of confinement but are claims cognizable under § 1983. The State has the right, when it provides an effective and adequate administrative remedy as does Maryland, to require use of that remedy to "clean its own house." "Exhaustion of adequate administrative remedies in section 1983 cases allows the state agency to apply its expertise, develop a factual record, and cure its own errors without prejudicing the litigant's right to a federal forum." Sullivan, *supra* at p. 552.[34]

---

> burden of sifting through the mass of these petitions on federal judges, let alone Supreme Court justices.
>
> While the deluge of prisoner petitions descends upon the federal courts, nothing is directed to the state courts, to the state judges who ordered incarceration in the first instance. And while state courts clearly have inherent power to require the establishment of administrative procedures to process prisoner complaints and to deal with legal problems generated by prison life, under recent case law it is the federal judge who must listen to state prisoner complaints. Even acknowledging the basic responsibilities of an Article III judge to be hospitable to constitutional claims, the federal judiciary's receptiveness to prisoners' civil rights claims no longer makes sense in view of the burgeoning federal case load." *Washington, supra,* at pp. 1303-04 (App. 66a-68a).

[34] "The Commission seems to have gained acceptance by correctional administrators throughout the state. It has recognized and reinforced areas of proper correctional

While it was believed that there was scant legislative intent for an exhaustion requirement, Representative Hoar stated:

> "To authorize the interference of Congress there must be, not merely those inperfections and failures in the administration of law which are attendant upon all civil governments alike, but there must be a clear case of denial of government. We cannot interfere to deal with the incidental evils which attend upon Republican government; but we should interfere . . . wherever these evils have attained to such a degree as amounts to the destruction, to the overthrow, to the denial to large classes of the people of the blessings of Republican government altogether." Congressional Globe, 42nd Congress, First Session (1871), at p. 334.

If it was truly the legislative intent to provide a federal remedy where a state remedy was not in fact adequate, it also follows that legislative intent requires that adequate state administrative remedies be exhausted. "The third element of congressional purpose requires that the federal court inquire not only into the state remedy's adequacy as it appears from statute and regulation, but also its adequacy in practice. Rather

practice and has identified numerous problem areas in the operation of the state's correctional system, assisting in their resolution. It has also become a 'safety valve,' in the eyes of some correctional personnel, for relieving tensions within institutions.

"The Inmate Grievance Commission was originally viewed by some as the means through which major change could be stimulated within Maryland's Correctional System. While this goal does not yet appear to have been achieved, the Commission has (i) validated inmate grievances in a significant number of cases, (ii) had its recommendations accepted by correctional authorities in the great majority of cases, (iii) expressed public and official concern for the care and treatment of those incarcerated and (iv) emphasized the need for correctional services to be administered fairly, in a humane manner, and in harmony with statutory and



than precluding exhaustion, this element sup[p]orts the exhaustion requirement, since there is no reason to

constitutional guarantees." *Ombudsman/Grievance Mechanism Profile — No. 3, supra,* at p. 11.

A full tabulation of the first three years of the Commission's operation shows, regarding all cases filed, the following statistics:

"APPENDIX B

MARYLAND INMATE GRIEVANCE COMMISSION DATA

| | 7/1/71-6/30/72 | 7/1/72-6/30/73 | 7/1/73-6/30/74 | Three Years 7/1/71-6/30/74 |
|---|---|---|---|---|
| Complaints Received by IGC | 340 | 609 | 731 | 1680 |
| Average Number of Complaints Per Month | 28.3 | 50.8 | 60.9 | 46.7 |
| Number of Inmates (Year-End Population) | 5255 | 5197 | 5807 | |
| Ratio—Inmates per IGC Complaint | 15.5 | 8.5 | 7.9 | 10.3 |
| Inmate Civil Right Cases Filed in Maryland Federal District Court | 78 | 110 | 81 | |
| Inmate Civil Rights Cases Filed, All Districts | 3348 | 4174 | 5236 | |
| Maryland Civil Rights Cases as Percentage of Total Filings | 2.3% | 2.6% | 1.6% | |
| IGC Complaints Administratively Dismissed | | | | 936 |
| Cases Heard | | | | 707 |
| Cases Open (Incomplete Preliminary Investigation) | | | | 73 |
| IGC Order Issued | | | | 638 |
| Complaint Meritorious | | | | 191 |
| Complaint Without Merit | | | | 417 |
| Moot | | | | 30" |

*Ombudsman/Grievance Mechanism Profile — No. 3, supra,* at p. 16.

*See also* 56 Judicature 314, *supra.*

distinguish between adequate and inadequate remedies if the exhaustion principle is to be abrogated in all section 1983 cases." Sullivan, *supra* at pp. 553-54.

This Court has never been presented with an effective and adequate state administrative remedy since its decision in *Monroe, supra.* Under these circumstances, it is clear that the vehicle is present by which this Court may require that a state inmate pursue those remedies before filing a § 1983 action.

> "As previously pointed out, this Court does not think that anything in the prior trend of decisions prohibits this action, although, in all candor, the cases would not seem to encourage it. *But those were different cases dealing with different facts, with administrative remedies almost neolithic compared to the Maryland Inmate Grievance Procedure." McCray, supra* at p. 1207 (App. 30a). [Emphasis supplied][35]

[35] There are several other recent reported decisions which discuss exhaustion of adequate state administrative remedies which are pertinent to this case. In *Hyde v. Fitzberger,* 365 F. Supp. 1021 (D. Md. 1973), Senior Judge R. Dorsey Watkins concurred with the finding of Chief Judge Northrop in *McCray v. Burrell, supra,* and required exhaustion of adequate state administrative remedies. In *Jones v. Superintendent,* 370 F. Supp. 488 (W.D. Va. 1974), that court quoted with approval the decision in *McCray v. Burrell, supra,* but indicated that it was applicable only in Maryland, which had established adequate state administrative remedies. In *Borror v. White,* 377 F. Supp. 181, 184-85 (D. Va. 1974), that court quoted extensively from *McCray, supra,* and found itself in complete agreement with Judge Northrop's observations regarding the detrimental impact of § 1983 cases on the administration of justice. The court then indicated that it was in agreement with Judge Northrop's finding that the Maryland Inmate Grievance Commission was an adequate state administrative remedy. *See also Farrington v. State of North Carolina,* 391 F. Supp. 714, 719 (D. N.C. 1975); *Hardwick v. Ault,* 517 F.2d 295, 297 (5th Cir. 1975); *Clark v. Zimmerman,* 394 F. Supp. 1166, 1171 (D. Pa. 1975); *Fuentes v. Roher,* 519 F.2d 379, 386 (2d Cir. 1975); *Plano v. Baker,* 504 F.2d 595, 597 (2d Cir. 1974); and *Cordova v. Reed,* ___ F.2d ___, No. 1063, September Term, 1974 (2d Cir., Aug. 7, 1975), ("In the absence of a definitive holding, however, this Circuit has not abandoned the rule of *Eisen v. Eastman,* 421 F.2d 560 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970), regarding exhaustion of administrative remedies in certain situations."), *Cordova, supra,* Slip Opinion at p. 5467.



A bona fide effort by the State of Maryland, coupled with an effective and adequate remedy, clearly points to the conclusion that the State should be allowed a first opportunity to resolve prisoner grievances. The trend of the 1960's, when the reported cases suggested an apparent indifference of the states to individual rights, has disappeared. Whatever problems have existed have generally been eliminated by the states, due, in part, to the receptiveness of the Federal Courts to prisoner claims. Maryland is one such State and now asks only to be given the opportunity to utilize its tools to finish the job.[36]

## IV.

**THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT REVERSED THE JUDGMENTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND IN McCRAY v. BURRELL, NO. 74-1042, AND McCRAY v. SMITH, NO. 74-1043, BASED ON A FINDING THAT REPSONDENT McCRAY'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED UNDER THE CIRCUMSTANCES OF THOSE CASES AND REMANDED THE SAME FOR DETERMINATIONS ON THE MERITS.**

The United States Court of Appeals for the Fourth Circuit clearly erred in *McCray v. Burrell,* No. 74-1042,

[36] Broadcast speech of Sir Winston Churchill on February 9, 1941, in response to a message delivered to him from President Franklin D. Roosevelt by Wendell Wilkie.

> "We shall not fail or falter, we shall not weaken or tire. Give us the tools and we will finish the job."

and *McCray v. Smith*, No. 74-1043, when it held that Respondent's constitutional rights had been violated by confinement in isolated cells for limited periods of time. The Fourth Circuit held, in *McCray v. Smith, supra*, that while the conditions of confinement *per se* did not amount to a denial of his constitutional rights, the failure to notify a psychiatrist/psychologist pursuant to the directive of the Maryland Penitentiary may have amounted to a constitutional denial. *See McCray, supra*, 516 F.2d at pp. 367-69 (App. 89a-91a). In *McCray v. Burrell, supra*, the Fourth Circuit found two constitutional violations: (1) the conditions of confinement in the mental observation (M.O.) cell and (2) the failure to comply with the administrative directive to contact a psychiatrist/psychologist. *See McCray, supra*, 516 F.2d at pp. 368-69 (App. 90a-92a). The Fourth Circuit acknowledged the extensive findings of fact made by the District Court which resolved questions of credibility and accepted those findings. It also accepted the District Court's findings that Respondent's confinement in the isolated areas was not intended as punishment but was for mental observation and as a precaution against real fears that Respondent would do harm to himself and/or incite others. *McCray, supra*, 516 F.2d at pp. 365, 367 (App. 84a, 87a-88a).

On appeal from the finding of a trial court in a non-jury action, the findings of fact of the trial court will not be set aside unless clearly erroneous and due regard will be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52, Federal Rules of Civil Procedure; *B's Co., Inc. v. B. P. Barber & Assoc., Inc.*, 391 F.2d 130, 132 (4th Cir. 1968); and *Agee v. Hickman*, 490 F.2d 210 (8th Cir. 1974). Further, the decision and judgment of the trial court will not be disturbed on appeal if it is supported by substantial



evidence, and if the same is not erroneous as a matter of law. *Hellman v. Colonial Insurance Co.*, 475 F.2d 1061 (9th Cir. 1973); *B's Co., supra* at p. 138. Judge Widener, in his separate opinion, stated that while the majority accepted the findings of the District Court, it disregarded, he believed improperly, the inferences made by the District Court which he felt the Court was unable to do. See the separate opinion of Judge Widener, 516 F.2d at p. 375 (App. 103a), and the cases cited therein.

While not directly stating that the District Court's application of the facts to the law was clearly erroneous, the Fourth Circuit apparently rested its decision on its finding that it did not approve of isolated confinement rather than on a finding that the Eighth Amendment prohibits such isolated confinement. Judge Field, in his separate opinion, in which Judge Russell joined and with which Judge Widener agreed, also construed the majority opinion in this manner.

In *McCray v. Smith*, Respondent, on November 20, 1971 was removed from his regular cell due to his complaints about unsanitary conditions, and Petitioner Smith, who had never met McCray prior to this time, ordered him showered and placed in another cell. Subsequently, Respondent began a vocal disturbance; Petitioner Smith determined that he was to be removed from his cell and placed in isolated confinement (I.C.) to avoid the possibility of starting a disturbance in his housing area. *McCray, supra*, at p. 1211 (App. 37a-38a) and *McCray, supra*, 415 F.2d at 516 F.2d at p. 365 (App. 84a-85a). When Respondent was being placed in the I.C. area, he again caused a disturbance and was placed in I.C. cell Number 5. *McCray, supra*, 415 F.2d at pp. 365-366 (App. 85a). In accordance with the administrative directive, when Petitioner Smith checked on Respond-

ent the next morning and found that he had spread human feces throughout the cell, he determined that Respondent was not in a position to be returned to his regular cell and contacted Mr. Musk, the institutional psychologist (T. 225). Under these circumstances, the institutional psychologist was contacted within twenty-four hours in accordance with the administrative directive (T. 242). On November 22, 1971, Respondent, acting normally, was returned to his regular cell. *McCray, supra,* 516 F.2d at p. 366 (App. 86a).

In *McCray v. Burrell,* on January 1, 1972, a fire broke out in Respondent's cell and, after the same was put out, he received medical attention after being abusive to the nurse. Mrs. Weber, the nurse at the Maryland Penitentiary hospital, advised the institutional physician that Respondent was being placed in the mental observation (M.O.) unit, and the institutional physician instructed Mrs. Weber to contact Dr. Stewart (T. 502). Mr. Musk, the institutional psychologist, acknowledged that he was familiar with the incident and the fire in January 1972, and that he saw Respondent in the isolated confinement area (T. 383-84). Respondent was placed in the mental observation cell at about 9:45 a.m. on January 1, 1972, and released about 8:00 a.m. on January 3, 1972. *McCray, supra,* 516 F.2d at pp. 366-67 (87a).

The District Court held that the confinement of Respondent "in both cases for forty-eight hours was not an unreasonable period when one considers the surrounding circumstances in each case" and that "the defendant's actions were not excessive exercises of authority beyond the limits of civilized standards of decency" and were not "intended as punishment for the plaintiff's conduct . . . they were employed as precautionary measures. The removals . . . to isolated cells



were not pointless impositions of suffering . . ." and there was not "a less severe alternative that would have achieved the purposes for which the confinement was imposed." *McCray, supra* at pp. 1215-16 (App. 44a-48a). *See also McCray, supra,* 516 F.2d at pp. 366-67 (87a-88a).

The two primary tests for violation of the Eighth Amendment are: (1) were the conditions of confinement such as to shock the conscience of the court and amount to cruel and unusual punishment and (2) is the punishment rationally related to a permissible end or is it arbitrary, unreasonable, or unnecessary *i.e.,* is there a less severe alternative to achieve "the purposes for which the confinement was imposed." *McCray, supra,* 367 F. Supp. at p. 1216 (App. 45a-47a); *McCray, supra,* 516 F.2d at pp. 367-68 (App. 89a). *See also Landman v. Royster,* 354 F. Supp. 1302, 1318 (E.D. Va. 1973); *Howard v. Smyth,* 365 F.2d 428, 431 (4th Cir. 1966); *Almond v. Kent,* 459 F.2d 200, 204 (4th Cir. 1972); and *Weems v. United States,* 217 U.S. 349, 370 (1910).

The Fourth Circuit found possible constitutional deprivations in the failure of Petitioners Burrell and Smith to follow the administrative directive of the Maryland Penitentiary which would require the notification of a psychologist/psychiatrist when an individual displayed irrational behavior. Judge Field noted in his separate opinion that the majority bolstered its opinion by seizing . . . "upon an institutional directive which stated that 'an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified' . . . this somewhat novel constitutional pronouncement utterly ignores the finding of the district judge that the *principal* reason for McCray's

isolation was to insulate the other inmates of the South Wing from the potentially dangerous and disruptive consequences of McCray's outrageous and flagrant misconduct, including what the district judge found was his attempt 'to burn his cell and possibly the entire South Wing.' . . . The fact is, however, he required no such medical attention, and I am unaware of any constitutional principle which requires or justifies the incorporation of such an institutional directive into the Bill of Rights." *McCray, supra*, 516 F.2d at pp. 373-374 (App. 100a-102a). *See also Fitzgerald v. Estelle*, 505 F.2d 1334, 1343 (5th Cir. 1975); and *Rodriguez v. McGinnis*, 451 F.2d 730, 732 (2d Cir. 1971). It is clear in both cases that the isolation of Respondent was pursuant to the policy of the Maryland Division of Correction, and there was testimony in both instances that Petitioners Smith and Burrell notified the psychologist within twenty-four hours and that Mrs. Weber notified the institutional physician so that the necessary arrangements could be made (T. 242, 502). The determination by the Fourth Circuit that there were violations of the administrative directive was error.

In *McCray v. Smith*, while the Fourth Circuit did not find the conditions of confinement in the isolated confinement (I.C.) section of the Maryland Penitentiary to be *per se* cruel and unusual punishment, it did find that confinement to the mental observation (M.O.) unit was per se cruel and unusual punishment in *McCray v. Burrell. McCray, supra*, 516 F.2d at pp. 368-369 (App. 90a-91a). Judge Field noted that in *McCray v. Smith*, due to Respondent's behavior, the decision to place Respondent in the I.C. cell without clothing and a mattress was not unreasonable under the circumstances, as Respondent had indicated that he would do bodily harm to himself. The following morning, after



Smith discovered Respondent's condition, he had him showered and returned to the cell after it was cleaned. *McCray, supra*, 516 F.2d at pp. 372-73 (App. 98a-99a). Judge Field further noted that the same mental aberrations existed in the situation with Petitioner Burrell, and that Respondent was placed in the M.O. cell without clothing in order to protect himself from self-injury. *McCray, supra*, 516 F.2d at pp. 372-73 (App. 99a). In *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966), which involved the conditions of solitary confinement at the Virginia State Penitentiary, the evidence disclosed that the prisoners in such confinement subsisted on a diet of bread and water for two days, were deprived of all items for personal hygiene, and that the authorities resorted to the use of tear gas twelve to fifteen times in the course of a year. "Judge Sobeloff . . . concluded that since the case came to us on conflicting testimony, we were not prepared to say that the findings of the district judge were clearly erroneous." McCray, *supra*, 516 F.2d at p. 372 (App. 98a). Judge Field noted that the findings and conclusions of the District Court in this case should be accorded similar respect.

The District Court found that the physical aspects of the cells in both the isolated confinement and mental observation areas were primitive but substantially the same. "However, it is significant that the plaintiff candidly admitted on several occasions he had requested to be placed in the I.C. area because it was more conducive to preparation of legal papers. While it is true that he was fully clothed on these latter visits to I.C., it does indicate that the conditions of the cells were not intolerable." McCray, *supra*, at p. 1216 (App. 46a-47a). After finding that Respondent was placed in the isolated areas on both occasions to avoid provoking

situations which could start a riot, the District Court found that none of these events was arbitrary or capricious punishment, with which the Fourth Circuit agreed. *McCray, supra*, 516 F.2d at p. 373 (App. 100a). The District Court then concluded that Petitioners' actions "were not excessive exercises of authority beyond the limits of civilized standards of decency . . . Nor were they intended as punishment for plaintiff's conduct, but, as has been repeatedly stated, they were employed as precautionary measures. The removals of the plaintiff from his cell on the South Wing to isolated cells were not pointless impositions of suffering, nor was there a less severe alternative that would have achieved the purposes for which the confinement was imposed. *Furman v. Georgia*, 408 U.S. 238." *McCray, supra*, at p. 1216 (App. 46a-47a). *See also Landman v. Royster, supra.*

Judge Field further noted that this was not a case dealing with an arbitrary or pervasive pattern of conduct as in *Landman v. Royster, supra; Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), or with prolonged confinement in strip cells as in *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); nor was there an attempt at arbitrary punishment as in *Howard v. Smyth*, 365 F.2d 428 (4th Cir. 1966). *See McCray, supra*, 516 F.2d at pp. 374-75 (App. 101a-102a). *See also Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972), a case where the inmate was placed in a strip cell for periods of eleven days and twenty-one days to demean and punish him.

Judge Field concluded that he read the majority opinion to be that "it is tantamount to a declaration that in this circuit the Eighth Amendment proscribes any substantial disciplinary action by prison authorities no matter how extreme and disruptive the misconduct of the inmate may be. In my opinion we would better serve the interests of justice and orderly prison administration by heeding the admonition of Judge Kaufman in *Sostre v. McGinnis*, 442 F.2d 178, 190-191, (2 Cir. 1971):



> 'For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes. It is not only that we, trained as judges, lack expertise in prison administration. Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us as a federal court to command state officials to shun a policy that they have decided is suitable because to us the choice may seen unsound or personally repugnant.'" *McCray, supra*, 516 F.2d at pp. 374-75 (App. 102a).

The District Court further found that while the Division of Correction of Maryland was plagued with considerable prisoner unrest, it should be allowed to avoid situations which could ignite a riot, and that such an attempt was the principal factor when Respondent was placed in the isolated areas. *McCray, supra*, at pp. 1213-14 (App. 40a-44a).

Under all the circumstances of this case, the Fourth Circuit clearly erred, as: (1) it made no finding that the District Court was clearly erroneous; (2) its incorporation of the administrative directive of the Division of Correction as a constitutional guarantee was improper under the circumstances of this case, since there was evidence which clearly indicated that the administrative directive was followed; and (3) it made inconsistent findings that while the isolated confinement (I.C.) area of the Maryland Penitentiary was not a constitutional deprivation, confinement to mental observation (M.O.)

was a constitutional deprivation. Especially in light of the finding of the District Court that the two areas were substantially the same, Respondent's confinements in those two areas were not constitutional deprivations.

## CONCLUSION

The General Assembly of Maryland in 1971 established for the first time in this country a highly professional state agency with the specific responsibility of adjudicating effectively, promptly, and fairly allegations of improper conditions of confinement lodged by prisoners in state institutions. The experience of the past four years indicates that the Inmate Grievance Commission has fulfilled its promise. The Commission's record and the record in this case establish beyond question that Maryland has an effective and adequate administrative remedy. Overriding reasons of policy and sound judicial administration require a reversal of the opinion and judgment of the United States Court of Appeals for the Fourth Circuit that such a remedy may be by-passed at the whim of a state prisoner. The prior holdings of this Honorable Court are not inconsistent with the relief prayed.



For these reasons, Petitioners urge that the opinion and judgment of the United States Court of Appeals for the Fourth Circuit should be reversed and the opinion and judgment of the United States District Court for the District of Maryland in these cases should be affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General,
CLARENCE W. SHARP,
Assistant Attorney General,
Chief, Criminal Division,
DONALD R. STUTMAN,
Assistant Attorney General,
One South Calvert Building,
Baltimore, Maryland 21202
For Petitioners.